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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1453~~. 1051

THE CALIFORNIA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNION COMPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 17, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 17, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Union Compress Company, plaintiff, and The California Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of December, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

{The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.}

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—
HENRY C. CALDWELL,
U. S. Dist. Judge.

Service acknowled. Dec. 8, 1888.
UNION COMPRESS CO.,
By G. W. CARUTH, *Att'y.*

The execution of the foregoing writ of error appears from the schedule hereto annexed.

2 Be it remembered that on March 30, 1888, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, western division, the Union Compress Company, by Caruth and Erb, Esq'r's, its attorneys, and filed therein its complaint against the California Insurance Company.

3 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the ninth day of April, anno Domini one thousand eight hundred and eighty-eight, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 25, 1888, as follows:

UNION COMPRESS COMPANY *v.* CALIFORNIA INSURANCE COMPANY.

Comes the defendant, by E. W. Kimball, Esq., its attorney, and on his motion leave is granted him to file answer herein.

On July 2, 1888, as follows:
Comes the plaintiff, by Caruth and Erb, Esq'r's, its attorneys, and files herein its demurrer to the answer.

4 On July 24, 1888, as follows:
Now, on this day, came the plaintiff, by Caruth and Erb, its attorneys, and also came said defendant, by E. W. Kimball, its attorney, and the demurrer to the answer herein being submitted on argument, the defendant, pending the argument, asked leave to amend its answer herein, and leave is granted to it to amend, as asked, by the 20th day of September next, but on condition that it shall file here a written election between the defence of want of proof of loss and any and all other defences which it may have in this cause by the 1st day of August next.

On August 2, 1888, as follows:
Comes the defendant, by E. W. Kimball, its attorney, and files herein its election to stand on the amended answer that he may file on or before September 20th next and to abandon the defences set up in the first paragraph of its answer.

On October 16, 1888, as follows:
Comes the defendant, by E. W. Kimball, Esq., its attorney,
5 and files herein its amended answer.

6 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the twenty-second day of October, anno Domini one thousand eight hundred and eighty-eight, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

On November 17, 1888, as follows:

Comes the plaintiff, by Caruth and Erb, U. M. & G. B. Rose, and Dodge and Johnson, Esq'r's, its attorneys, and comes the defendant, by E. W. McGraw and E. W. Kimball, Esq'r's, its attorneys, and the parties proceed to the argument of the demurrer to the answer herein, and the same, not being concluded, is continued until Monday morning.

On November 19, 1888, as follows:

Comes the plaintiff, by Caruth and Erb, U. M. & G. B. Rose, and Dodge and Johnson, Esq'r's, its attorneys, and files herein its prayer for the verification of the answer, and comes the defendant, by E. W. McGraw and E. W. Kimball, Esq'r's, its attorneys, and files
7 herein its motion to strike out portions of the depositions of C. G. Warner and W. H. Newman; and the argument on the demurrer to the answer not being concluded on Saturday the same is now resumed, and, not being concluded, it is continued until to-morrow morning.

On November 20, 1888, as follows:

Comes the plaintiff, by Caruth & Erb, U. M. & G. B. Rose, and Dodge & Johnson, Esq'r's, its attorneys, and asks leave to file a substituted complaint herein, which leave is granted, and it is accordingly filed, to stand as the sole complaint in this cause; and comes the defendant, by E. W. McGraw and E. W. Kimball, Esq'r's, its attorneys, and files herein its motion to strike portions of the said substituted complaint and also its demurrer to said substituted complaint, and the same are heard, argued, and submitted to the court; and the court, being now well and sufficiently advised in the premises, considers that the said motion to strike and the demurrer be, and the same are hereby, overruled; to both of which rulings of the court the defendant at the time excepted; and the said defend-
8 ant thereupon files its answer to the substituted complaint, and the said plaintiff files its demurrer to said answer, and the same is heard, argued, and submitted to the court; and the court, being now well and sufficiently advised in the premises, considers that said demurrer be overruled as to the fourth and tenth paragraphs of the answer, and that it be sustained as to the seventh and eighth paragraphs of said answer; to which ruling of the court sustaining the demurrer to the seventh and eighth paragraphs of the answer the defendant at the time excepted; and, the parties announcing themselves for trial, thereupon a jury came, to wit, J. W. Martin, William Acree, A. B. Williamson, B. C. Duffie, W. R. Bethel, Thomas Ives, A. K. Gaines, A. W. Lange, E. J. Field, H. L. Fletcher, H. S. Townsley, and Gus. Blass, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence; and thereupon this cause is continued until to-morrow.

9 & 10 Which substituted complaint is in the words and figures following, to wit:

11 *Substituted Complaint at Law.*

In the Circuit Court of the United States for the Eastern District of Arkansas.

UNION COMPRESS CO., Plaintiff,
vs.
CALIFORNIA INSURANCE COMPANY, Defendant.

Comes the plaintiff, The Union Compress Co., a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, and a citizen of said State, and brings this its complaint against The California Insurance Company of San Francisco, a corporation created by and existing under the laws of California, and a citizen of said State, and for its cause of action herein plaintiff alleges—

That heretofore, to wit, on the 14th day of November, 1887, and for a long time prior thereto, it was engaged in the business of compressing cotton, which it received or held on its own account or on commission or in trust for others, at its certain warehouses and compress buildings and adjoining sheds and platforms, situated at the foot of Main street, in the city of Little Rock, Ark.

That at the date aforesaid said plaintiff had on hand about 2,800 bales of cotton delivered to it to be compressed and belonging to divers parties; that the value thereof equaled the sum total of the insurance thereon, as hereinafter set forth.

That at said time said cotton, whether owned by plaintiff or held by it on commission or in trust for others, was insured in the following-named insurance companies against loss or damage by fire in the several amounts stated opposite their respective names, to wit:

Name.	Amount.	Name.	Amount.
Liverpool & London & Globe Ins. Co.	$5,000	Hibernia Ins. Co. of N. O.	2,500
Commercial U. Association Co.	3,000	Phœnix Ins. Co. of Brooklyn	5,000
Hanover & C. Fire Ins. Co. of N. Y.	5,000	California Ins. Co.	10,000
American Cent. Ins. Co. of St. Louis	2,500	New Orleans Ins. Association	5,000
North British & Mercantile Ins. Co.	10,000	Connecticut Fire Ins. Co.	2,500
Crescent Ins. Co. of N. O.	3,000	Home Ins. Co. of N. Y.	5,000
Pelican Ins. Co. of N. O.	2,500	Germania Fire Ins. Co. of N. Y.	5,000
Southern Ins. Co. of N. O.	10,000	Penn. Fire Ins. Co.	3,000
Commercial Ins. Co. of San Francisco	10,000	German Ins. Co. of Freeport, Ill.	3,000
Ins. Co. of North America, of Phila.	5,000	Ætna Ins. Co.	5,000
Northern Association Co. of London	2,500	Anglo-Nevada Ass'n Corp'n of San Fran.	5,000
St. Paul Fire and Marine Ins Co.	3,000	Springfield Fire & Marine Co.	5,000
National Fire Ins. Co. of Hartford	5,000	German-American Ins. Co. of N. Y.	5,000
		Hartford Fire Ins. Co.	5,000
		Imperial Fire Ins. Co. of London	10,000

That the policy of insurance in writing of said defendant was issued to plaintiff on the 2nd day of November, 1887, in consideration of the payment to said defendant of a certain premium therein

expressed, and thereby the said defendant insured this plaintiff against loss or damage by fire to the amount of $10,000.00 on cotton in bales held by it in trust or on commission and contained on the premises hereinabove described; that said original policy is held by plaintiff ready to be exhibited at any time and is subject to the order of the court herein.

That on said 14th day of November, 1887, all the cotton in bales contained on its said premises and insured as aforesaid was destroyed by fire, together with a large quantity of other cotton in possession of plaintiff at said place, which was not insured by plaintiff.

That at the time that said cotton came to the possession of the plaintiff it was engaged in the business of compressing cotton at its compress in the town of Argenta, opposite Little Rock, and on the north side of the Arkansas river, and that said cotton was deposited with the plaintiff for compression by various owners thereof, who delivered the same at the sheds and yards and adjacent grounds in the said city of Little Rock, as described in said policy, with directions that the same should be transported to said compress by the plaintiff or some carrier employed for that purpose by it, and that on the receipt of any bales of said cotton by said plaintiff it gave a receipt for the same to the owner thereof, and that, according to a custom known to said depositors, to the plaintiff, and to the St. Louis, Iron Mountain & Southern Railway Co. and the Mis-
12 souri Pacific Railway Co., of which it was a part, and the Little Rock & Memphis Railroad Company, which were common carriers having and operating railroads of which both Argenta and Little Rock were stations, said owners transferred said receipts to either one or the other of said carriers and received from said carriers bills of lading for the transportation by said carriers of said cotton to various places to which said cotton was then and there shipped by said owners, with an agreement with said railway companies that said cotton should not be shipped until it had been compressed by the plaintiff. There was a standing and continuing agreement between said plaintiffs and said railway companies that the plaintiff should proceed to compress said cotton and all cotton thus received and should insure the same, after notice of the execution of said bills of lading by said railway companies, against loss by fire during the time that said cotton should be in the hands of the plaintiff, for the purpose aforesaid, for a price averaging from sixty to sixty-five cents per bale, to be paid by said railway companies, respectively, when said cotton should be compressed and delivered to said railway companies on their cars at Argenta for transportation under said bills of lading, at which time said carriers should surrender to plaintiff the said receipts issued as aforesaid at the time that said cotton was deposited with the plaintiff for compression by the owners, as above stated; that all of said cotton was in the custody of plaintiff at the time of said loss under and by virtue of said custom and agreement, and that it was lost by the negligence of the servants, agents, and employés of said railway companies, and that since said loss said St. Louis, Iron Mountain & Southern Railway Company has been sued in this court by two of said consignees for

the value of part of said cotton above named, to wit, the York Manufacturing Company and Hazard & Chapin, and said railway company defended said actions on the ground that said loss was not occasioned by the negligence of said railway company or its servants and employés, and on a trial of said first-named cause it was adjudged by this court that said York Manufacturing Company and said Hazard and Chapin recover from said railway company the value of said cotton sued for as aforesaid, and that since said adjudication said railway company has paid said judgment and the value of a large part of the cotton for which it had issued bills of lading as aforesaid, and that several suits are now pending in this court against said Little Rock & Memphis Railroad Company, brought by the consignee of portions of said cotton for the recovery of damages for the loss of said cotton by reason of the negligence of said railroad company, which said suits are now pending and undetermined.

On said 14th day of November, 1887, the plaintiff had in its possession at its sheds and premises above mentioned, for purposes of compression, a large amount of cotton, to wit, over 3,000 bales; that of this number 2,700 bales of cotton were held by this plaintiff for the St. Louis, Iron Mountain and Southern Railway Company and the Little Rock & Memphis Railroad Company. By said contract and agreement between plaintiff and said railroads this plaintiff took out the policies of insurance above set out for the purpose of indemnifying this plaintiff against loss and liability and the said railroad companies against loss and liability by reason of the destruction of said cotton while it was being held by plaintiffs for purposes of compression. The St. Louis, Iron Mountain & Southern railway has been adjudged as aforesaid to pay a large sum of money, to wit, $—, and in addition has paid a still larger amount because of its liability for such loss, amounting in all up to this date to $72,209.58, and has made demand therefor against the plaintiff for reimbursement of said losses.

That the loss by said fire on said cotton equaled the insurance thereon, and by reason thereof said defendant became and now is indebted to plaintiff in the full amount of its said policy.

That plaintiff has performed all the conditions of said policy on its part, but, nevertheless, said defendant has wholly failed and refused to pay said loss.

Wherefore plaintiff prays judgment against said defendant for the sum of $10,000.00 and interest, together with costs in and about this suit expended and for other proper relief.

CARUTH & ERB,
Attorneys for Plaintiffs.

Which policy of insurance is as follows:

13 No. 5204. $10,000.

Stock Policy.

The California Insurance Company of San Francisco.

Incorporated February, 1861.

[Vignette.]

In consideration of the stipulations herein named and of seventy dollars premium to be paid by the insured hereinafter named, does insure the Union Compress Co. for the term of thirty days, from the second day of Nov., 1887, at noon, to the second day of Dec., 1887, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding ten thousand dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit:

Form of Cotton Policy.

$10,000 on cotton, in bales, their own or held by them in trust or on commission, while contained in the frame shed 112 to 122, inclusive, & in b'ck shed & yard 115 to 123, inclusive, North Main street, & on platforms adjoining & in street immediately between the sheds, Sanborn's map of Little Rock, Ark's; & it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy; & it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased shall constitute delivery of cotton from the seller to the buyer; and it is further agreed that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire; and it is further agreed that tickets, checks, or receipts delivered to bearer shall not be considered as evidence of ownership. Other insurance permitted without notice until required.

This company will not be liable beyond the amount herein insured, nor beyond the actual cash value of the property at the time any loss or damage may occur. Such cash value shall in no case be estimated to exceed the reasonable cost, at the time and place of loss, of new property which would duplicate the property destroyed. In estimating such cash value the condition immediately before the fire of the property destroyed shall be considered, and if it be then of less value than it would be if new such smaller value, and not the value of new property, shall be deemed its actual cash value for all purposes of this policy. In case of goods, manufactured or in process, insured in the hands of the manufacturer, the value shall not be deemed to exceed the actual cash cost of materials and labor.

The loss or damage to property insured, unless agreed upon between the company and the insured, shall be appraised and determined as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and perfected proof of the loss have been received by this company in accordance with the terms of this policy. In case of loss or damage to the property insured, it shall be optional with the company, in lieu of paying such loss or damage, to replace the articles lost or damaged with others of the same kind and quality, and to rebuild or repair the building or buildings within a reasonable time, provided that notice of its intention to do so shall be given within thirty days after having received the perfected proofs of loss hereinafter required; and in case of damage to personal property, it shall be optional with the company, in lieu of paying such damages, to take the damaged articles, paying the insured therefor the agreed or appraised value thereof at the time immediately preceding the fire; but there can be no abandonment to the company of the property insured.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night, or overtime, or on Sunday, or if it cease to be operated for more than five days in any one year; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within-described premises for more than five days in any one year; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a leasehold or a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise; or if this policy be assigned before or after a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the

contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, natural gas, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by any public enemy, invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by earthquake, hurricane, explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall or become untenantable, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease, and this company shall not be liable for loss by fire resulting from such fall.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money notes or securities, nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewelry, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, hoisting apparatus, sculpture, tools, or property held on storage, on commission, or for repairs; nor for loss to plate, plated ware, watches, printed books, engravings, paintings and their frames, printed music, ornaments, musical instruments, fresco-work or gilding on walls or ceilings, fences, privies, outbuildings, merchandise in show windows; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

No insurance broker is the agent of this company. Any broker or other party procuring this policy from the company, or any renewal thereof or endorsement thereon, shall be considered in all cases the agent of the assured. Any brokerage, rebate, or commission from the premium herein mentioned shall be an allowance made to and for the benefit of the assured only.

There shall be no waiver of any written or printed condition or restriction of this policy, except by endorsement written upon the policy by the company. No agent has authority to bind the company in any other manner.

This policy may, by a renewal, be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void; and all renewals shall be considered as made under the original representations and subject to the original warranties, unless otherwise specified in writing hereon.

This insurance may be terminated at any time, at the request of the assured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, and this policy shall be deemed canceled upon the company giving notice to that effect and refunding or tendering a ratable proportion of the premium for the unexpired term of this policy. In case the premium shall not be paid on demand, then this insurance shall immediately cease.

Persons claiming loss or damage under this policy shall comply with and perform the provisions and conditions printed on the back hereof, headed "Relating to Proofs of Loss," which provisions and conditions are declared and agreed to be and form a part of this policy the same and to the same effect as though incorporated and set out at large herein.

Reinsurance shall be on the basis that in no event shall the liability be for a greater sum than such portion hereby reinsured bears to the whole sum insured by the company reinsured; and, in case of loss, payment shall be made *pro rata*, at the same time and in the same manner as by the company reinsured.

In case of any other insurance upon the property hereby insured, whether to the same party or upon the same interest therein or otherwise, whether valid or not, and whether prior or subsequent to the date of this policy, the insured shall be entitled to recover from this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies, or by policies covering only in excess of specified loss; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner.

When property insured under this policy is damaged by removal from a building exposed to loss by fire, such damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof, in due form required by this policy, shall be made by the claimant so insured.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this com-

pany shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

It is furthermore hereby expressly provided and mutually agreed that no suit or action of any kind against this company for the recovery of any claim upon, under, or by virture of this policy shall be sustainable in any court of law or chancery until after full compliance by the insured with all the requirements of this policy, nor unless suit or action shall be commenced within twelve months next after the fire shall have occurred; and in case any suit or action shall be commenced against this company after the expiration of said twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Wherever in this policy the word "insured" occurs it shall be held to include the legal representatives of the insured, and wherever the word "loss" occurs it shall be deemed the equivalent of "loss or damage."

☞ Machinery, tools, implements, and material laid aside because of the substitution of improved articles in their stead, and patterns laid aside because of disuse, are not covered by this policy.

☞ Plate-glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not covered by insurance on the building, but must be separately and specifically insured.

☞ And it is further expressly declared and agreed that none of the clauses or conditions of this policy shall be subject to be varied in their application or legal effect by evidence of nor by the existence of any usage or custom whatsoever.

☞ The use of general terms or anything less than a distinct specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This policy shall not be valid until countersigned by the duly authorized agent of the company at Little Rock, Ark.

In witness whereof the California Insurance Company has caused

these presents to be signed by its duly authorized officers, in the city of San Francisco, State of California.

L. L. BROMWELL, *President.*
WM. H. C. FOWLER, *Secretary.*

Countersigned at Little Rock this 2d day of November, 1887.
WM. COHOON, JR., *Agent.*

Cancellation or Short-Rate Table.

The per cent. of premium named in the following table is to be retained when a policy is surrendered for cancellation, being the same premium that would have been charged had the policy been originally written for the time in force. Compute from day of the commencement of risk named in the policy.

One-year policies.		Term policies.	
Time the policy has been in force.	Retain of premium.	Time the policy has been in force.	Retain of premium.
1 day	2 p. ct.	Three years.	
2 days	4 p. ct.		
3 "	5 p. ct.		
4 "	6 p. ct.	For 3 months or less	20 p. ct.
5 "	7 p. ct.	Over 3 and not over 6 m'ths	30 p. ct.
6 "	8 p. ct.	" 6 " " 9 "	40 p. ct.
7 "	9 p. ct.	" 9 " " 12 "	50 p. ct.
8 "	9 p. ct.	" 12 " " 15 "	60 p. ct.
9 "	10 p. ct.	" 15 " " 18 "	70 p. ct.
10 "	10 p. ct.	" 18 " " 21 "	75 p. ct.
11 "	11 p. ct.	" 21 " " 24 "	80 p. ct.
12 "	12 p. ct.	" 24 " " 27 "	85 p. ct.
13 "	13 p. ct.	" 27 " " 30 "	90 p. ct.
14 "	13 p. ct.	" 30 " " 33 "	95 p. ct.
15 "	14 p. ct.	" 33 months	100 p. ct.
16 "	14 p. ct.		
17 "	15 p. ct.		
18 "	16 p. ct.		
19 "	16 p. ct.	Four years.	
20 "	17 p. ct.		
25 "	19 p. ct.		
30 "	20 p. ct.	For 4 months or less	20 p. ct.
35 "	23 p. ct.	Over 4 and not over 8 m'ths	30 p. ct.
40 "	26 p. ct.	" 8 " " 12 "	40 p. ct.
45 "	27 p. ct.	" 12 " " 16 "	50 p. ct.
50 "	28 p. ct.	" 16 " " 20 "	60 p. ct.
55 "	29 p. ct.	" 20 " " 24 "	70 p. ct.
60 "	30 p. ct.	" 24 " " 28 "	75 p. ct.
65 "	33 p. ct.	" 28 " " 32 "	80 p. ct.
70 "	36 p. ct.	" 32 " " 36 "	85 p. ct.
75 "	37 p. ct.	" 36 " " 40 "	90 p. ct.
80 "	38 p. ct.	" 40 " " 44 "	95 p. ct.
85 "	39 p. ct.	" 44 months	100 p. ct.
90 " 3 m'ths	40 p. ct.		

Cancellation or Short-Rate Table—Continued.

One-year policies.		Term policies.	
Time the policy has been in force.	Retain of premium.	Time the policy has been in force.	Retain of premium.
105 days	45 p. ct.		
120 " 4 m'ths	50 p. ct.		
135 "	55 p. ct.	Five years.	
150 " 5 m'ths	60 p. ct.		
165 "	65 p. ct.		
180 " 6 m'ths	70 p. ct.	For 5 months or less	20 p. ct.
195 "	73 p. ct.	Over 5 and not over 10 mo's	30 p. ct.
210 " 7 m'ths	75 p. ct.	" 10 " " 15 "	40 p. ct.
225 "	78 p. ct.	" 15 " " 20 "	50 p. ct.
240 " 8 m'ths	80 p. ct.	" 20 " " 25 "	60 p. ct.
255 "	83 p. ct.	" 25 " " 30 "	70 p. ct.
270 " 9 m'ths	85 p. ct.	" 30 " " 35 "	75 p. ct.
285 "	88 p. ct.	" 35 " " 40 "	80 p. ct.
300 " 10 m'ths	90 p. ct.	" 40 " " 45 "	85 p. ct.
315 "	93 p. ct.	" 45 " " 50 "	90 p. ct.
330 " 11 m'ths	95 p. ct.	" 50 " " 55 "	95 p. ct.
360 " 12 m'ths	100 p. ct.	" 55 months	100 p. ct.

Relating to Proofs of Loss.

Referred to in lines 5 to 8, inclusive, and lines 53 to 55, inclusive, of within policy.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity, quality, and cost of each article, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly

sustained loss to the amount that such magistrate or notary public shall certify.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable in case of loss to a third party or is held as collateral security, or any claim for loss shall have been assigned after any fire, the proof of loss shall be made by the party originally insured, and shall set out fully the interest of the party to whom the loss is made payable; and, when required, the party to whom the loss is payable shall make proofs on oath of the character and extent of such interest in detail.

In case of claim for a loss under this policy, the insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing (in detail, if required) of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. The award in writing of the appraisers shall be binding on the parties as to the amount of loss or damage, but shall not affect the question of the liability of the company under the policy. The appraisement and award herein provided for shall be and be deemed a portion of the proofs of loss of the insured, and such proofs shall not be deemed to be perfected until such award is made and served on the company, or in lieu thereof the company and the insured have agreed upon the amount of loss or damage.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and perfected proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

If any other matter of difference shall arise, not relating to the liability of the company under this policy, it shall be submitted to disinterested parties to be appointed in the manner above provided

for the ascertainment of the amount of loss, and their award shall be conclusive as to all matters submitted.

Such submission to appraisement and arbitration, when demanded, shall be a condition precedent to any right of action upon this policy.

No. 5204. Expires Dec. 2. 1887.

Fire policy California Insurance Co.

[Monogram.]

To Union Compress Co.
On cotton.
$10,000 @ — %; premium, $70.
Agency at L. R.

WM. COHOON, JR., *Agent.*

The California Insurance Company of San Francisco.

Incorporated February, 1861.

Officers.

L. L. Bromwell, president,
John Bermingham, vice-pres't.
W. H. C. Fowler, secretary.

Directors.

L. L. Bromwell,	S. C. Bigelow,
Samuel Merritt,	W. J. Bryan,
Daniel Meyer,	A. W. Scholle,
Henry Wadsworth,	E. J. LeBreton,

John Bermingham.

Principal office, No. 318 California street,

San Francisco, Cal.

☞ NOTE.—This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by declaration on its face. In case of actual sale or transfer of title, leave being previously obtained, the annexed form may be used, which must be executed at the time of said transfer.

The California Insurance Company hereby consents that the interest of —— —— in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to —— ——.

—— —, 18—.

For value received, — hereby transfer, assign, and set over unto —— —— and — assigns, — title and interest in this policy, and all

advantage to be derived therefrom, subject to all the terms and conditions therein mentioned and referred to.

Witness — hand this — day of ——, 18—.

—— ——.

The California Insurance Company hereby consents that the interest of —— —— in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to —— ——.

—— —, 18—.

For value received, — hereby transfer, assign, and set over unto —— —— and — assigns, — title and interest in this policy, and all advantage to be derived thereform, subject to all the terms and conditions therein mentioned and referred to.

Witness — hand this — day of ——, 18—.

—— ——

LITTLE ROCK, ARK., *May* 26, 1888.

Received of the California Insurance Co., of San Francisco, California, through Griffith & Brisbin, agents of said company, the sum of three hundred thirty-eight & $\frac{11}{100}$ dollars, being in full of all claims and demands for partial loss or damage under policy No. 5204, issued November 2d, 1887, it being expressly understood and agreed that this payment is made by the California Insurance Company without waiving any of the rights or privileges under said policy.

UNION COMPRESS CO.
W. H. WRIGHT, *P't.*

14 Which motion to strike is as follows:

15 In the Circuit Court of the United States for the Eastern District of Arkansas.

UNION COMPRESS COMPANY, Plaintiff,

vs.

CALIFORNIA INSURANCE CO., Defendant.

Now comes the defendant and moves the court to strike from the substituted complaint of plaintiff all the matter therein contained commencing with the words "together with a large quantity of other cotton in possession of plaintiff," on the tenth line from the bottom of the first page, and down to and including the words "demand therefor against the plaintiff for reimbursement of said losses," on the seventh line from the bottom of the second page thereof, on the ground that the same is immaterial and irrelevant.

E. W. KIMBALL,
E. W. McGRAW,
Attorneys for Defendant.

Which demurrer to the substituted complaint is as follows:

16 In the Circuit Court of the United States for the Eastern District of Arkansas.

UNION COMPRESS CO., Plaintiff,
vs.
CALIFORNIA INS. CO., Defendant.

Now comes the defendant and demurs to the substituted complaint of plaintiff filed herein, upon the ground that it does not state facts sufficient to constitute a cause of action.

And said defendant also demurs separately to that portion of the substituted complaint commencing with the words "that at the time said cotton came to the possession of the plaintiff," on the eighth line from the bottom of the first page, down to and including the words "demand therefor against the plaintiff for reimbursement of said losses," on seventh line from the bottom of the second page thereof, upon the ground that the facts therein stated do not tend to constitute a cause of action.

E. W. KIMBALL,
E. W. McGRAW,
Attorneys for Defendant.

Which answer to the substituted complaint is as follows:

17 *Answer.*

In the Circuit Court of the United States for the Eastern District of Arkansas.

UNION COMPRESS COMPANY *vs.* CALIFORNIA INS. CO.

1. The defendants admit that they issued the policies of insurance filed herein and say they are subject to the conditions therein contained.

2. As to the allegation in the complaint that on November 14, 1887, the plaintiff held 2,700 bales of cotton for the railway companies named in the complaint, and that the same were then destroyed by fire, the defendants deny any knowledge or information thereof sufficient to form a belief as to its truth or falsity, and so requires the plaintiff to prove the same; but the defendant admits that a large amount of cotton was destroyed at said fire, but as to the amount thereof covered by said policies in excess of 112 bales they have no knowledge or information sufficient to form a belief, and so require the plaintiff to prove the same.

3. The defendant avers that at said fire 112 bales of cotton belonging to Fred. Hanger *et als.* and held by plaintiff in trust for said Hanger was burned, for the loss of which the insurance companies named in the complaint have paid the plaintiff $4,826.59 in full satisfaction thereof, and of which sum this defendant paid —, its full portion of said loss.

4. The defendant denies that the owners of cotton who deposited the same with plaintiff did so with directions that the same should be transported to the compress of plaintiff by the plaintiff or some carrier appointed by it to do so. As to the custom alleged in the complaint, the defendant denies any knowledge or information sufficient to form a belief, and so requires the plaintiff to prove the same.

And as to the standing and continuing agreement between the plaintiff and the railroad companies named in the complaint, respecting the compression and insurance of cotton, the defendant denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of the complaint, and so requires the plaintiff to prove the same. The defendant denies that the policy sued on was taken out by plaintiff under the contract and agreement named in the complaint, but avers that the greater portion of the cotton alleged to have been lost at said fire was received by the plaintiff from the owners thereof after the date of the issuance of said policy.

5. The defendant denies that at the time of said fire the plaintiff owned any of the cotton destroyed or held the same on trust or commission, except the 112 bales belonging to said Hanger.

6. The defendant says that whatever cotton was burned at said fire was first delivered by the owners to the plaintiff, for which the plaintiff gave the owners receipts, which provided that the plaintiff should not be liable for loss of same by fire; that afterwards, and after such policy was issued, said cotton was sold to various persons, firms, and corporations, who then became the owners thereof, and the Missouri Pacific Railway, the Little Rock & Memphis railway, and the Little Rock, Mississippi River & Texas railway, common carriers of cotton for hire, issued their respective bills of lading for the same to such purchasers, which provided that said carriers should not be liable for loss thereof by fire, and at the same time said bills of lading were issued said railroad companies took up the said receipts issued by the plaintiff to the original owners and surrendered them to the plaintiff, whereby the possession of said cotton was changed, contrary to the provisions of the policy sued on, without consent of, notice to, or knowledge of the defendant.

7. The defendant says that it is a provision of said policy that it shall not apply to or cover cotton which at the time of the loss was covered in whole or in part by marine policies, and it says that at the time of said loss 2,172 bales of said cotton, alleged by plaintiff to have been burned at said fire, and of the value of $101,973.73, were covered by marine policies theretofore issued to the respective owners of said cotton.

8. They further say that after said railroads had issued their said bills of lading for said cotton and before and at the time of said fire said cotton was kept in a grossly negligent manner in a dangerous public place, without being covered or sprinkled, and but a few feet from a railroad track where locomotives of said Missouri Pacific and St. Louis, Iron Mountain and Southern railroads, emitting sparks, were constantly passing, by which sparks the fire was kindled, and the

said cotton was destroyed by a fire which occurred in broad daylight, at about 4 o'clock p. m., and which fire the said Missouri Pacific and St. Louis, Iron Mountain and Southern Railroad Companies, by the use of ordinary care, could have extinguished by removing the bales first ignited or by putting out the same by water from the hydrants which were close by.

9. The defendants further say that at the time of said fire there was a total insurance on the cotton burned to the amount of about $250,000, and by the terms of this policy the defendant is liable only for such portion of the whole loss as the amount of its policy bears to the sum of all the insurance existing at the time of the loss.

10. The defendant denies that said cotton or any of it was destroyed by the negligence of the Little Rock and Memphis railroad or of its servants, agents, or employees.

McGRAW,
KIMBALL,
For Defendant.

Which demurrer to answer is as follows:

18 Comes said plaintiff and as to said 4th and 7th and 8th paragraphs of said substituted answer it demurs, because they do not, either of them, state facts sufficient to constitute a defense herein.

CARUTH & ERB.

And on November 21, 1888, as follows:

Comes the plaintiff, by Caruth and Erb, U. M. & G. B. Rose, and Dodge & Johnson, Esqrs., its attorneys, and comes the defendant, by E. W. McGraw and E. W. Kimball, Esqrs., its attorneys; and A. K. Gaines, one of the jurors, having asked to be excused from further service in this case, and both parties consenting thereto, it is ordered that he be discharged from the pannel in this cause, and by consent of both parties it is ordered that the trial herein proceed with eleven jurors; and thereupon the said jurors came, to wit, J. A. Martin, William Acue, A. B. Williamson, B. C. Duffie, W. R. Bethel, Thos. Ives, A. W. Lange, E. J. Field, H. L. Fletcher, H. S. Townsley,
19 and Gus. Blass, and proceed to hear the evidence as well on the part of the plaintiff as of the defendant, and the trial hereof not being concluded, the same is continued until to-morrow.

And on November 26, 1888, as follows:

Comes the plaintiff, by Caruth and Erb, U. M. & G. B. Rose, and Dodge & Johnson, Esqrs., its attorneys, and comes the defendant, by E. W. McGraw and E. W. Kimball, Esqrs., its attorneys, and comes the jury, to wit, J. A. Martin, William Acue, A. B. Williamson, B. C. Duffie, W. R. Bethel, Thomas Ives, A. W. Lange, E. J. Field, H. L. Fletcher, H. S. Townsley, and Gus. Blass, and, having heard all the evidence and argument of counsel and having been charged and instructed by the court, consulted of their verdict and returned into court the following verdict: We, the jury, find the issues for the plaintiff, and assess its damages at the sum of nine thousand four hundred and ninety-one dollars and ninety-six cents.

It is, therefore, considered, ordered, and adjudged that the
20 said plaintiff, The Union Compress Company, do have and recover of and from said defendant, The California Insurance Company, the said sum of nine thousand four hundred and ninety-one dollars and ninety-six cents (9,491.96) for its damages found as aforesaid, together with all its costs herein expended, and have execution therefor.

21 And on December 8th, 1888, as follows:

Bill of Exceptions.

UNION COMPRESS CO.
v.
CALIFORNIA INSURANCE CO. } 4635.

Comes the defendant, by E. W. Kimball, Esq., its attorney, and files herein its bill of exceptions, which is signed by the judge; and also citation and writ of error, which are signed and allowed by the court.

Which bill of exceptions is as follows:

Bill of Exceptions of Defendant.

In the Circuit Court of the United States for the Eastern District of Arkansas.

UNION COMPRESS COMPANY
vs.
THE CALIFORNIA INSURANCE COMPANY.

Be it remembered that on the 20th day of November, A. D. 1888, the plaintiff filed its substituted complaint herein, as appears on the judgment-roll (see pages 10 & 11), and the said defendant
22 thereupon filed its demurrer as well to the which substituted complaint as to specific portions thereof; which demurrer reads as follows, to wit (see page 16),

That the portion of said substituted complaint separately demurred to by the demurrer aforesaid is that portion thereof reading as follows, to wit:

That at the time that said cotton came to the possession of the plaintiff it was engaged in the business of compressing cotton at its compress, in the town of Argenta, opposite Little Rock, and on the north side of the Arkansas river, and that said cotton was deposited with the plaintiff for compression by various owners thereof, who delivered the same at the sheds and yards and adjacent grounds in the said city of Little Rock, as described in said policy, with directions that the same should be transported to said compress by the plaintiff or some carrier employed for that purpose by it; and that on the receipt of any bales of said cotton by said plaintiff it gave a receipt for the same to the owner thereof, and that, according to a custom known to said depositors, to the plaintiff, and to the St. Louis, Iron Mountain & Southern Railway Co. and the Missouri Pacific

Railway Co., of which it was a part, and the Little Rock & Memphis Railroad Company, which were common carriers having and operating railroads of which both Argenta and Little Rock were stations, said owners transferred said receipts to either one or the other of said carriers and received from said carriers bills of lading for the transportation by said carriers of said cotton to various places to which said cotton was then and there shipped by said owners, with an agreement with said railway companies that said cotton should not be shipped until it had been compressed by the plaintiff. There was a standing and continuing agreement between said plaintiff and said railway companies that the plaintiff should proceed to compress said cotton and all cotton thus received, and should insure the same, after notice of the execution of said bills of lading by said railway companies, against loss by fire during the time that said cotton should be in the hands of the plaintiff for the purpose aforesaid, for a price averaging from sixty to sixty-five cents per bale, to be paid by said railway companies, respectively, when said cotton should be compressed and delivered to said railway companies on their cars at Argenta for transportation under said bills of lading, at which time said carriers should surrender to plaintiff the said receipts issued as aforesaid at the time that said cotton was deposited with the plaintiff for compression by the owners, as above stated; that all of said cotton was in the custody of plaintiff at the time of said loss under and by virtue of said custom and agreement, and that it was lost by the negligence of the servants, agents, and employés of said railway companies; and that since said loss said St. Louis, Iron Mountain & Southern Railway Company has been sued in this court by two of said consignees for the value of part of said cotton above named, to wit, the York Manufacturing Company and Hazard & Chapin; and said railway company defended said actions on the ground that said loss was not occasioned by the negligence of said railway company or its servants and employés, and on a trial of said first-named cause it was adjudged by this court that said York Manufacturing Company and said Hazard and Chapin recover from said railway company the value of said cotton sued for as aforesaid, and that since said adjudication said railway company has paid said judgment and the value of a large part of the cotton for which it had issued bills of lading as aforesaid, and that several suits are now pending in this court against said Little Rock & Memphis Railroad Company, brought by the consignee of portions of said cotton, for the recovery of damages for the loss of said cotton by reason of the negligence of said railroad company, which said suits are now pending and undetermined.

On said 14th day of November, 1887, the plaintiff had in its possession, at its sheds and premises above mentioned, for purposes of compression, a large amount of cotton, to wit, over 3,000 bales; that of this number 2,700 bales of cotton were held by this plaintiff for the St. Louis, Iron Mountain and Southern Railway Company and the Little Rock & Memphis Railroad Company. By said contract and agreement between plaintiff and said railroads this plaintiff took out the policies of insurance above set out for the purpose

of indemnifying this plaintiff against loss and liability and the said railroad companies against loss and liability by reason of the destruction of said cotton while it was being held by plaintiff for purposes of compression. The St. Louis, Iron Mountain & Southern railway has been adjudged as aforesaid to pay a large sum of money, to wit, $——, and in addition has paid a still larger amount because of its liability for such loss, amounting in all up to this date to $72,209.58, and has made demand therefor against the plaintiff for reimbursement of said losses.

23 That at the same time of the filing of the demurrer aforesaid the defendant filed a motion to strike out a portion of the substituted complaint of plaintiff, which motion reads as follows, to wit (see page 15):

That the matter in said substituted complaint moved to be stricken out as aforesaid is all that portion thereof hereinbefore specifically set forth as having been separately demurred to, and also the words in said substituted complaint immediately thereon preceding said matter separately demurred to and reading as follows, to wit: "Together with a large quantity of other cotton in possession of plaintiff at said place, which was not insured by plaintiff;" and said demurrer and said motion were overruled by the court; to which ruling defendant duly excepted, as appears by the judgment-roll herein.

Whereupon said defendant duly filed its answer to the substituted complaint herein, which answer appears on the judgment-roll (see page 17), and plaintiff filed its demurrer to said answer,

24 which demurrer also appears in the judgment-roll (see page 18), and the court partially sustained and partially overruled said demurrer, and to the order of the court sustaining said demurrer in part, which order appears in the judgment-roll (see pages 7 & 8), the defendant duly excepted, which exception also appears in the judgment-roll. In all the pleadings, demurrers, and motions aforesaid the policy of insurance of defendant sued on was by agreement considered as forming a part of the complaint, and was referred to and considered as a portion of the complaint and as on file under the statutes of Arkansas.

Afterwards, a jury having been duly empanelled to try said cause, the plaintiff, to sustain the issues in said case on its part to be sustained, offered evidence tending to prove that the insurance policy sued on was taken out by the Union Compress Company for the benefit of the railway companies named in the substituted complaint and in pursuance of contracts and agreements between said Union Compress Company and said railway companies by which the former agreed to take out such insurance; to all of which

25 evidence the defendant, at the proper time and in proper form, objected upon the ground that the same was incompetent, and that such evidence was in contradiction of the terms of the written policy of insurance sued on, which objection was overruled by the court; to which ruling the defendant, by its counsel, then and there duly excepted.

The plaintiff also offered evidence tending to prove the course of business of the Union Compress Company as follows, to wit:

The Union Compress Company, at all times covered by the policies named in the complaint, were engaged in the business of compressing cotton at the town of Argenta, which is directly opposite the city of Little Rock and on the north bank of the Arkansas river. It received cotton for compression at Argenta and also received cotton at the premises described in the policy in question at Little Rock.

For cotton received at either place receipts of the Union Compress Company were issued to the depositors—red receipts at Argenta and green receipts at Little Rock—in the following form:

26 "LITTLE ROCK, ARK., —— —, 188–.

Received by the Union Compress Co.—
From ——.
Account of ——.
For compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.
Marks, ——.
No. bales cotton, ——."

The holders of such receipts took them to the freight offices of one or the other of the two railway companies named in the complaint and such railway companies issued bills of lading for such cotton, agreeing to deliver the same at an address specified in such bills of lading, and which bills of lading specified No. of bales of cotton received and the marks thereon. The same bills of lading covered cotton which was received by the Union Compress Company at Argenta and which actually was at Argenta and cotton received at Little Rock and which actually was at Little Rock.

One form of bill of lading was issued by the Missouri Pacific Railway Company, which form is shown in a bill of lading introduced
27 in evidence by plaintiff and claimed to cover a portion of cotton burned, and which reads as follows:

Cotton Bill of Lading. "*Domestic.*"

No. ——.

The Missouri Pacific Railway Co.

LITTLE ROCK STATION, —— DIVISION, *Oct.* 21, 1887.

Received from J. W. Pope & Co. —— bales of cotton in apparent good order, marked and numbered as below, to be transported from Little Rock, Ark., to St. Louis, Mo., and delivered to the consignees or a connecting common carrier.

The cotton aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood as part of the consideration for which the said cotton is received that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of the said cotton, as

though herein inserted at length; and especially that neither of said carriers or this company shall be liable for loss or damage of any kind occasioned by delays from any cause, or by change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals, or rivers; and it is further especially understood that for all loss or damage occurring in the transit of the said cotton the legal remedy shall be against the particular carrier only in whose custody the said cotton may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said cotton to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. All cotton will be subject to necessary baling and is received at owner's risk of wet and dirt, and carriers will not be accountable for loss in weight arising from unavoidable causes, freight to be paid on the actual gross weight as ascertained by the company's scales. Claims for damage must be reported by

Copy.

the consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice of claim for damage is not thus given neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve to themselves the privilege of compressing all cotton signed for on this bill of lading.

No liability will be assumed for wrong carriage or wrong delivery of cotton that is imperfectly marked.

NOTICE.—This contract is accomplished and the liability of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehousemen only thereafter, and unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival the cotton may be removed and stored by the company at owner's risk and expense in the warehouse of the company or one of its selection, and after remaining in such warehouse sixty days the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county, for not less than ten days, and sell the cotton either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges.

In accepting this contract the shipper or other agent of the owner of the cotton carried expressly accepts and agrees to all its stipulations and conditions.

Rates Guaranteed.	Consigned to order Providence, R. I.
To Providence, R. I.	Notify Henry T. Bennett,
—— cts. per bale.	Providence, R. I.
18 cts. per 100 lbs.	
Charges advanced, $——.	

Number of bales.	Marks.	Tag numbers.	Weight, subject to correction.
50	G O O P	A. R. Bragg.	25,039
29	C A P E	A. F. A.	14,527
51	B P T		26,660
15	I C E D		7,326
40	G L [7 *J*		20,682
186			93,230

28 Two forms of bills of lading were issued by the Little Rock and Memphis R. R. Co., as is shown by bills introduced in evidence by plaintiffs and claimed to cover cotton burned, and which read as follows, to wit:

Copy.

Little Rock & Memphis Railroad Company.

No. 5911. Oct. 31, 1887.

Rates Guaranteed.

To Clinton, Mass.
Charges advanced, $——.

1st class, —— cts. per 100 lbs.
2d class, —— cts. per 100 lbs.
3d class, —— cts. per 100 lbs.
4th class, —— cts. per 100 lbs.
5th class, —— cts. per 100 lbs.
Cotton, 78 cts. per 100 lbs.
Cotton, —— per bale.
—— cts. per 100 lbs.
Flour and meal, —— per bbl.
Beef, pork, and fish, —— per bbl.
Special, —— per car.

Received from T. F. Howell & Co. the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported from Little Rock, Ark., to Memphis, Tenn., and delivered to the consignee or a connecting common carrier. The packages aforesaid must pass through the custody of several carriers before reaching their destination, and it is understood, as a part of the consideration for which the said packages are received, that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them,

respectively, of said packages, as though herein inserted at length, and especially that neither of said carriers or either or any of them shall be liable for leakage of any kinds of liquids, nor for losses by the bursting of casks or barrels or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage of hay, hemp, cotton, or the evaporation or leakage of liquids of any description, leakage of grain in bulk, or for damages to personal property of any kind occasioned from delays from any cause or change of weather, or for loss or damage by fire, or for loss or damage on the sea or rivers. It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, it being understood that the Little Rock & Memphis railroad in receiving the said packages to be forwarded as aforesaid assumes no other responsibility for their safety or safe carriage than may be incurred on its own road. All goods carried by this company are charged at actual gross weight, excepting such articles as are provided for in our general tariff.

All property will be subject to necessary cooperage, and freight is to be paid on the actual gross weight as ascertained by the company's scales. Roads not accountable for loss in weight of flour, grain, seed, feathers, and ginseng arising from unavoidable causes. Cotton in bales at owner's risk of wet and dirt. Claims for damage must be reported by consignee to the delivering line within thirty-six hours after the arrival of the freight at the place of delivery indicated above. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

☞ No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbers, or imperfectly marked.

Consigned to order. Notify Lancaster Mills, at Clinton, Mass.

☞ Weight and classification subject to correction.

Marked.	List of articles.	Weight.
X B J ------	103 bales cotton ----------	51,683 lb.
	Signed, S. W. TUCKER, *Ag't G.*	

29 *Through Bill of Lading No.* 21 *Ex. Contract No.* 5.

Memphis and Little Rock Railroad Company, as Reorganized, and the Huntington Steamship Company.

From Little Rock, Ark., to Liverpool, England.

Shipped, in apparent good order, by —— ——, the following property, marked or numbered as below (weight, measure, gauge, quality, condition, quantity, brand, contents, and value unknown), weight subject to correction:

	Marks and numbers.	Merchandise.
Through rate: 97c., gold, per 100 lbs. Gross weight, 174,095 lbs. Advance charges, $—.	L (K) B---- 25 " (O) " ---- 51 " (C) " ---- 138 " (I) " ---- 100 " (T) " ---- 19 " (K) G---- 5 " (O) " ---- 4 " (C) " ---- 4 " (E) " ---- 1 " (F) B---- 4 351 b. c. Ralli, # 8, 128 b. c. Ralli, # 9, 223	Three hundred and fifty-one bales cotton. Notify Ralli Brothers.

To be delivered, in like good order and condition, at the port of Liverpool, England (or so near thereto as ship may safely get, with liberty to call at any usual port of call), unto order or his or their assigns upon payment, in cash, of freight due thereon, immediately on discharge of the property, at the rate of ninety-seven cents, American gold, per 100 lbs. gross weight and advanced charges, without any allowance for credit or discount, one pound sterling being considered equal to four dollars and eighty cents ($4.80) American gold (general average payable according to York-Antwerp rules), under the following terms and conditions, viz:

1. That the said Memphis & Little Rock R. R. Co. and its connections which receive said property shall not be liable for breakage of packages of eggs, or for rust of iron and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or changes of weather, nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in depots or places of transhipment or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the points receipted to for delivery.

2. It is further agreed that the said Memphis & Little Rock R. R. Co. and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

3. It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

4. And it is further agreed that the carriers shall not be liable for any discrepancy between the contents of the packages and the description of the same in the bills of lading.

5. And it is further agreed that from and after the arrival of said goods at the port of Newport News and while said goods remain on the wharf or wharves waiting for further conveyance the Memphis & Little Rock R. R. Co. shall not nor shall any of its connections, inland or ocean, be liable for delay, nor shall they or any of them be liable in respect of said goods otherwise than as warehousemen. It is also agreed that in case the whole or any part of the property specified herein be prevented, from any cause, from going on the first steamer of the line above stated leaving after the arrival of such property at said port the Memphis & Little Rock R. R. Co. is at liberty to forward the same by succeeding steamers of said line or, if deemed necessary, in the steamers of any other line.

6. And it is further agreed that this contract on the part of the Memphis & Little Rock R. R. Co. is accomplished and the liability of the Memphis & Little Rock R. R. Co. hereunder terminates on the delivery of the goods or property to the steamship or steamship line, her or its agents or servants, or on the steamship pier at port of New-

port News, when the responsibility of the steamship or steamship line begins and not before.

It is mutually agreed that, in respect to the transportation from the port of Newport News to port of destination, the ship shall have liberty to sail without pilots, to tow and assist vessels in distress, to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge or be prevented, from any cause, from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control; by the perils of the sea or other waters; by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or of the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, numbers, address, or description; nor for risk of craft, hulk, or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

I. It is al o mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, perfumes, works of art, silks, furs, china, porcelain, watches, or clocks in any respect, or for goods of any description whatever above the value of $20.00 per cubic foot, and in no case is the carrier to be liable beyond $500 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

II. Also that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive, or dangerous goods shipped without a full disclosure of their nature, whether such shipper be principal or agent, and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also that the carrier shall have a lien on the goods for all freights, primages, and charges, and also for fines or damages which the ship or cargo may incur or suffer by reason of incorrect or insufficient marking, numbering, or addressing packages or description of their contents.

IV. Also that in case the ship shall be prevented from reaching her destination by quarantine the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a

final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

V. Also that the ship may commence discharge immediately upon arrival and discharge continuously, the collector of the port being hereby authorized to grant a general order of discharge immediately on arrival, and upon discharge the goods shall be at the risk of the consignee, and if not taken by him within such time as is provided by the regulations of the port of discharge they may be stored by the carrier at the expense and risk of their owners, and the responsibility of the steamship or steamship line for merchandise to be carried at a through rate to a point beyond the port of discharge shall terminate on the delivery of the goods or property to the next carrier.

VI. Also that full freight is payable on damaged or unsound goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also that if on sale of goods at destination for freight charges the proceeds fail to cover said freight charges the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom-house, less all charges saved, except a lower value of the articles has been agreed upon with the shipper and such value noted hereon.

IX. Also freight payable on weight is to be paid on gross weight discharged or landed from ocean steamship, unless otherwise agreed.

X. Also goods destined for a continental port, in the event of the continental steamer being prevented by ice from reaching destined port, the master reserves the liberty of either landing cargo at nearest open port he can reach with safety or bringing it back to port of transhipment, in either case at consignees' risk and expense, but charging outward freight only; or, should the last steamer of the season have sailed for the above-destined port, the goods may be sent to the port nearest their destination with which there is direct communication or may be warehoused at the intermediate port at the expense and risk of the owners of the goods.

XI. Parcels for different consignees collected or made up in single packages addressed to one consignee to pay full freight on each parcel.

And, finally, in accepting this bill of lading the shipper, owner, and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder.

[On the margin:] Attention of shippers is called to act of Congress of 1851:

"Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder in a ship or vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing expressing the nature and character of such merchandise to the master, mate, or officer or person in charge of

the loading of the ship or vessel shall forfeit to the United States one thousand dollars."

In witness whereof the agent signing on behalf of the said Memphis & Little Rock Railroad Co. and of the said steamer or steamship company, severally and not jointly, hath affirmed to — bills of lading, all of this tenor and date, one of which bills being accomplished and given up to the carriers the others to stand void.

Dated, in Little Rock, Ark., this seventeenth day of October, 1887.

—— ——, *Agent.*

30 Upon the issue of bills of lading as aforesaid the respective railroad companies notified the Union Compress Company of their issue and ordered the cotton therein designated to be compressed at Argenta. All of said cotton transported from Little Rock to Argenta was so transported on the track and cars of the Missouri Pacific Railway Company. The Little Rock and Memphis Railroad Company had no track and ran no cars near the premises described in the policy. The Union Compress Company paid the Missouri Pacific Railway Company an agreed price for the transportation of said cotton from Little Rock to Argenta. After arriving at Argenta the cotton was to be compressed by the Union Compress Company and by them there loaded on the cars of such of the two railroad companies as its marks and the bills of lading called for to be by them transported to its destination in various States and countries.

Plaintiff also offered evidence tending to prove that by agreement between the said compress company and the railroad com-
31 panies the former charged and collected from the latter thirteen cents per hundred (13 per 100) pounds for all cotton compressed by them, which charge was by agreement extended to cover and did cover the compression of the cotton, the loading of the same on the cars at the latter place, and also the cost of insuring said cotton for the benefit of the railroad companies; to which evidence defendant, at the proper time and in proper form, duly objected on the ground that the same was immaterial, irrelevant, and incompetent; which objection was overruled by the court; to which ruling defendant, by its counsel, then and there duly excepted.

The plaintiff also offered evidence tending to prove that bills of lading were issued as follows, and that — covered thereby was missing, as follows:

Missouri Pacific Railway Company.

Date of bill — lading.	Number of bales missing.
Oct. 27	50
" 20	62
" 21	17
Nov. 3	20
Nov. 3	12
Nov. 11	9
" 11	39
Nov. 10	42
" 1	4
" 2	45
" 7	60
" 7	35
" 8	205
" 10	25
" 10	19
Oct. 21	23
Nov. 5	9
Oct. 31	19
" 10	13
" 31	38
Nov. 5	9
" 5	21
" 7	30
" 3	72
Oct. 21	176
Nov. 14	29
Oct. 31	52
Nov. 10	118
Nov. 9	48
" 14	22
Oct. 31	77
Nov. 14	60

Date of bill — lading.		Number of bales missing.
Oct. 17, 1887 " 21, " " 22, " " 31, " Nov. 2, "	Ralli Bros	158
Oct. 31, "		80
" " "		19
Nov. 1, "		132
" 3, "		24
" 7, "		59
" 10, "		72
" 1, "		24
" 2, "		31
" 1, "		20
" " "		15
" " "		45
" " "		13
" 3 "		100
" 2, " " 3, "		200

The plaintiff also offered other evidence tending to prove that two thousand six hundred and seventy bales of cotton covered by the bills of lading aforesaid were burned at the fire in question
34 while in the hands of the compress company for compression after bills of lading were issued and at the place described in the policy sued on.

It also offered evidence tending to prove that the contracts and custom of business before stated was well known to shippers and to defendant when the policy sued on was issued, it having been stated to the agents of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railway companies.

Defendant objected to the admission of this evidence, but its objection was overruled; to which ruling defendant at the time excepted.

That in October and November, 1887, there was an accumulation of cotton at the premises described in the complaint, owing to the

fact that the Missouri Pacific Railway Company had not sufficient cars to transfer the same to Argenta as fast as it was received; that the cotton sheds were open sheds and at the time of fire were full of cotton, without any tarpaulin or other cover over it, and
35 stowed within three or four feet of the track of the Missouri Pacific Railway Company, over which locomotives and trains passed several times daily; that said cotton, after the sheds were full, was stored in the street, leaving a passage-way some four feet wide for foot passengers, and also that the Missouri Pacific and the Little Rock and Memphis Railroad Company had no control over said cotton while so stored, and could not obtain actual possession thereof until the Missouri Pacific Railway Company transported the same to Argenta for compression, but the Missouri Pacific Railway Company could take the cotton at any time across the river for compression.

Plaintiff further offered evidence tending to prove that claims had been filed against the Missouri Pacific Railway Company by the owners of fourteen hundred and sixty-three bales of cotton burned at said fire, of the claimed value of seventy-two thousand seven hundred and thirty-five dollars and fifty-eight cents;
36 that since the commencement of this action said railway company had paid such claims to the amount of sixty-five thousand dollars, and that the balance had been adjusted by said company and would be paid; to which evidence the defendant objected on the ground that it was irrelevant, immaterial, and incompetent; which objection was overruled by the court; to which ruling defendant, by its counsel, then and there duly excepted.

Plaintiff further offered evidence tending to prove that claims had been filed against the Little Rock and Memphis Railroad Company by the owners of twelve hundred and eleven bales of cotton burned at said fire, of the claimed value of fifty-seven thousand five hundred and twenty-nine dollars and fifty-five cents, no part of which had been paid by said company, though suits had been brought in several of the claims and were still pending; to which evidence defendant objected on the ground that it was incompetent, irrelevant, and immaterial. The court overruled said objection; to which
37 ruling defendant, by its counsel, then and there duly excepted.

It appeared from bills of lading offered in evidence by plaintiff that the Little Rock and Memphis Railroad Company issued five bills of lading on cotton consigned to Ralli Bros., Liverpool, one of which is set forth above, and the other four were precisely similar. Under these five bills of lading it appeared that a loss of one hundred and fifty-eight bales of cotton, valued at seven thousand four hundred and eighty-eight dollars and thirty-six cents, was claimed to be burned at said fire.

Plaintiff offered in evidence the policy of insurance of defendant sued, which reads as follows. The other policies named in these suits are like this, in all respects material to the issues, and plaintiff proved that the cotton was burnt on the 14th day of November, 1887, and rested his case. (Policy, see page 13.)

Defendant, to sustain the issue on its part, offered competent evidence tending to prove that at the time of said fire two thousand one hundred and seventy-two bales of the cotton covered by the
38 bills of lading aforesaid and alleged to have been burned at the fire in question, and of the value of one hundred and one thousand nine hundred and seventy-three dollars and seventy-three cents, were at the time of said fire covered by marine policies of insurance theretofore issued to the respective owners of said cotton residing in various portions of the United States and in England; all of which evidence was by the plaintiff, at the proper time and in proper form, duly objected to on the ground that the same was immaterial and irrelevant and on the ground that the insured knew nothing of said policies and had no interest in them. The said objection was sustained by the court; to which ruling of the court defendant, by its counsel, then and there duly excepted.

Defendant also offered in evidence testimony of Rudolph Fink, taken by deposition on behalf of defendant and thereupon read therefore as follows, to wit:

Interrogatory 1. State your name, age, place of residence,
39 and what position you held on the 14th day of Nov., 1887, on the Memphis and Little Rock railroad, as reorganized, for the said road or its trustees.

Ans. 1. I am fifty-three years old, a resident of Memphis, Tennessee, and was on the 14th day of November, 1887, general manager and agent of the trustees of the Memphis and Little Rock Railroad Company, as reorganized.

Ques. 2. State what insurance, if any, the said roads or the said trustees had on the 14th day of November, 1887, on any merchandise or cotton which had been shipped on said road between the twentieth day of October, 1887, and the fifteenth day of November of that year, and in what insurance companies such insurance had been placed, what amount of insurance existed on the 14th day of said November on cotton then at Little Rock, Ark., not including insurance effected by Union Compress Company.

Ans. 2. The insurance the trustees had on the 14th day of Novem-
ber, 1887, on merchandise and cotton is stated in insurance
40 policy No. 242,616 of the Greenwich Insurance Company, herewith attached, exempting the insurance effected by the Union Compress Company.

And defendant then read in evidence the policy of insurance of the Greenwich Insurance Company attached to said deposition, by which policy the said company insured the Little Rock and Memphis Railroad in the sum of one hundred and eighty-eight thousand six hundred dollars, on their liability, &c., from October seventeenth, 1887, to October fifth, 1888, $3,000, said insurance being, as per the schedule thereto attached, as follows:

"$12,500 on merchandise, baggage, cotton, and other property contained in or on passenger and freight houses, warehouses, sheds, platforms, cotton presses, and wharves; this amount to cover the

liabilities of the assured as common carriers and warehousemen and for advanced charges.

Memphis	$3,000
Hopefield	2,000
Brinkley	2,000
Little Rock	3,000
Argenta	2,500"

41 And $25,000 thereof as follows:

"$30,000 on cotton in or on cars of all kinds, for which the assured are liable as common carriers and warehousemen."

"This policy of insurance covers said cotton, wherever the same may be, provided said cotton is in or on cars, and this insurance shall cover and apply to freight and other charges advanced by the assured to other roads. It is understood and agreed that the amount of this policy is divided in such way that not more than $15,000 shall cover cotton on flat or open cars and $15,000 shall only cover cotton in box cars."

"It is further agreed that no claim for cotton in box cars shall exceed $5,000 in consequence of any one fire, and no claim for cotton on flat or open cars shall exceed $5,000, in consequence of any one fire. The presentation of a claim for cotton in box cars, however, shall not prejudice the presentation of a claim for cotton on flat cars by the same fire. It is further understood and agreed that the actual payment by the assured to the owners of cotton de-
42 stroyed shall constitute a valid claim by the assured for indemnity from this company under this policy, anything in any printed bill of lading setting forth the non-liability of the assured to the contrary notwithstanding, this item not to attach in cars while said cars are in any building. Other insurance permitted.

"Attached to policy No. 242,616 of the Greenwich Insurance Co.
"(Signed) M. A. STONE, *Sec.*"

Said defendant, by its counsel, then announced to the court that it did not desire to offer in evidence any other portion of said deposition. On this the plaintiff insisted that the defendant having read a part of the deposition should read it all, and insisted that if the rest of the deposition was not read by defendant the plaintiff should be allowed to read the rest of it in chief on the ground that, before closing the plaintiff's evidence-in-chief, the plaintiff's counsel had asked in court whether defendant would read Fink's deposition, to which a reply by defendant's counsel was made in the affirmative, which the court held to be true, and the court held that if the defendant did not read all of the deposition the plaintiff might
43 read the rest of it as a part of its evidence-in-chief; to which ruling said defendant at the time excepted. Upon this said defendant elected to withdraw Fink's deposition and the policy referred to in it.

Defendant then offered in evidence the deposition of Lawrence

Phillips, who testified that he was chief clerk for Ralli Bros. and Galati & Co.; that he had charge of their accounts of cotton shipped at Little Rock to October and November, 1887, and that one hundred and fifty-eight bales, shipped by Galati & Co. to Ralli Bros. in the Little Rock and Memphis Railroad Company in said months, were burned at this fire; that all of this cotton was fully insured in marine companies—one-half in Insurance Company of North America; one-fourth in Sea Insurance Company of England; one-fourth in Marine Insurance Company of London. The policies of insurance mentioned in said deposition were not attached thereto.

In connection with said deposition defendant offered the testimony of William Bowen, a witness on the stand, that he was employed by defendant to procure said deposition
44 and others; that at the time of taking said deposition said Phillips promised to procure copies of the policies named by him, but afterward refused to furnish the same; that witness was informed that the original policies were in Liverpool, and that it was necessary to procure copies of such policies from the offices of the respective insurance companies in New York; that the Insurance Company of North America furnished said Phillips with what he said was a copy of its policy, but said Phillips refused to attach it to his deposition; that the Sea Insurance Company of England and the Marine Insurance Company of London refused to furnish said Phillips with copies of these policies; whereupon counsel for plaintiff moved the court to strike out all the testimony of said Phillips to the effect that said one hundred and fifty-eight bales of said Ralli cotton was fully covered by marine policies as incompetent, it being an attempt to prove the contents of written instruments; which motion was granted by the court; to which ruling of the court defendant,
45 by its counsel, duly excepted.

Defendant also offered as evidence proof of loss furnished by plaintiff to defendant; said proof of loss was made out after the commencement of this action and on or about June 26, 1888, which contained the following statement of the loss:

46 Second.

That at the time of said fire large quantities of cotton were stored in the above premises and street immediately between the two sheds, and that by reason of said fire 2,687 bales of said cotton were totally destroyed, in addition to what is known as the Hanger cotton.

Third.

That said 2,687 bales of cotton so destroyed were held by the said Union Compress Company in trust or on commission—that is to say, they were held by said company to be compressed and were the property of various persons—said compress company being interested in same to the extent of its charges.

Said cotton is described as follows:

No. of bales.	Value.	Consignee.
50	$2,420 78	J. Herbert Williams, New Orleans, La.
62	3,005 91	Seigfried & Co., New Orleans, La.
29	1,356 96	Amoskeag Manufacturing Co., Manchester, N. H.
20	960 52	Lyman Mills, Holyoke, Mass.
12	520 77	Lyman Mills, Holyoke, Mass.
48	2,204 45	John Farnum & Co., Lancaster, Pa.
42	1,951 38	Tuttle, Milne & Co., Fall River, Mass.
349	18,692 44	York Manufacturing Co., Saco, Maine.
25	1,082 27	Hazard & Chapin, Providence, R. I.
19	836 38	Hazard & Chapin, Providence, R. I.
23	1,104 78	Otis & Co., Ware, Mass.
9	451 96	Wamsutta Mill, New Bedford, Mass.
134	6,229 26	Barry, Thayer & Co., Boston, Mass.
9	443 60	Nourse, Dabney & Co., Boston, Mass.
21	999 39	Boston Manufacturing Co., Waltham, Mass.
30	1,432 36	A. S. Galatti, Liverpool, England.
72	3,396 82	A. S. Galatti, Liverpool, England.
176	8,318 90	Pepperell Manufacturing Co., Biddeford, Maine.
29	1,330 02	Manchester Mills, Manchester, N. H.
52	2,528 79	Woolly & Von Meysenberg, New Orleans, La.
118	5.773 90	August Bohn & Co., New Orleans, La.
70	3,458 81	Robert Moore & Co., New York city, N. Y.
77	3,964 42	H. L. Aldrich, Providence, R. I.
80	3,910 07	Amoskeag Manufacturing Co., Manchester, N. H.
100	4,749 45	Garner & Co., New York city, N. Y.
31	1,363 20	Tuttle, Milne & Co., Fall River, Mass.
20	1,037 93	Ashland Cotton Co., Jewett City, Conn.
15	822 60	H. N. Slater Manufacturing Co., Webster, Mass.
200	9,442 90	B. B. & R. Knight, Providence, R. I.
13	658 90	Hazard & Chapin, Providence, R. I.
24	1,176 00	Hazard & Chapin, Providence, R. I.
47	2,324 23	August Bohn & Co., New Orleans, La.
19	992 94	Lancaster Mills, Clinton, Mass.
132	6,152 53	Merrimac Manufacturing Co., Lawrence, Mass.
173	8,190 99	Amoskeag Manufacturing Co., Manchester, N. H.
68	3,140 16	Amoskeag Manufacturing Co., Manchester, N. H.
53	2,464 87	Amoskeag Manufacturing Co., Manchester, N. H.
6	274 63	Amoskeag Manufacturing Co., Manchester, N. H.
25	1,185 41	Amoskeag Manufacturing Co., Manchester, N. H.
47	2,202 89	Amoskeag Manufacturing Co., Manchester, N. H.
158	7,488 36	Ralli Bros. Liverpool, England.

And was at the time of said fire worth in actual cash $130,037.93.

47 The evidence being closed, defendant requested the court to instruct the jury as follows:

I.

The policy of insurance of the defendant in which this action is brought covered all goods in possession of the Union Compress Company at the place designated in the said policy, at the date when said policy was issued, which were held by the said Union Compress Company under warehouse receipts issued to the owners of said cotton by said company, and also all cotton subsequently and during the life of said policy so received by the Union Compress Company.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said refusal.

II.

The policy in question insures the goods of the Union Compress Company at the place designated. It also insures the Union Compress Company to the extent of its liens upon or charges against all goods held by it during the life of the policy not its own, but
48 held by it in trust or on commission. It also insures the interest of the owners of the legal title to such goods so held. It does not insure any one else. Any possible interest of any common carrier not an owner of the goods or any of them in the place designated is not insured by said policy.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said refusal.

III.

The jury are instructed to disregard all evidence in the case tending to show that the insurance in question was issued for the benefit of any railroad company not an owner of any of the goods destroyed by fire, for the value of which recovery is sought herein.

The court refused to give such instruction; to which refusal defendant, by its counsel, then and there duly excepted.

In its request for the foregoing instructions defendant said: "If the foregoing instructions are given the defendant does not
49 request further instructions; but if they are refused or modified the defendant further requests the court to instruct the jury as follows:

IV.

The policy in question provides that it shall be void if there be any change in the possession of the insured property, except under circumstances which have no bearing on this case. If the jury believe from the evidence that after the policy in question was issued any common carrier, with the knowledge and consent of plaintiff and under agreement with plaintiff, issued its bills of lading for any

of the cotton which at the date of the policy was or thereafter came into possession of the plaintiff, the issuance of such bills of lading under the conditions of the policy avoided the policy as to all cotton covered by such bills of lading. The court refused to give such instruction; to which refusal defendant, by its counsel, then and there duly excepted.

V.

If the jury should find from the evidence that there were
50 at the time of the fire outstanding valid policies of insurance covering the property insured by the policy herein *in* any portion thereof, then the liability of defendant, if it is liable at all, is only as to the proportion of the entire loss which the amount of the insurance herein bears to the entire amount of the insurance on the property.

The court refused to give said instruction; to which refusal defendant, by its counsel, then and there duly excepted.

VI.

If the defendant is liable at all herein a controlling element in fixing the amount of its liability is the value of the insured cotton burned on the day of the fire. In determining that value, if the jury find that in its proofs of loss furnished to the defendant the plaintiff places a value on the cotton alleged to have been destroyed the jury cannot increase that value in the absence of direct proof of mistake of the plaintiff in its estimate of value on its proofs of loss. The court refused to give said instruction; to which
51 refusal defendant, by its counsel, then and there duly excepted.

VII.

The plaintiff herein can recover for no cotton not included in its proofs of loss nor for the interest of any party, which interest is not covered by such proof of loss.

The court refused to give such instruction; to which refusal the defendant, by its counsel, then and there duly excepted.

VIII.

As this action is brought solely on behalf — the railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damages on account of the alleged fire, and the recovery cannot be greater than the value on November 14, 1887, at Little Rock, of the cotton so burned and paid for—nor greater than the sum paid by the railroad companies—that is, if they have paid more
52 than the value of the cotton they cannot recover the excess from defendant; if they have paid less than the value, they can recover only to the extent of the payment.

The court refused to give said instruction; to which refusal the defendant, by its counsel, then and there duly excepted.

The burden of proof rests on the plaintiff to show that the cotton, the value of which is claimed in this action, was on the premises described in the policy of insurance at the time of the fire, on November 14, 1887. The mere fact that a number of bales of cotton for which bills of lading had been issued by railway companies were never delivered by the Union Compress Company to the railways does not even tend to prove that the missing bales were burned at the fire in question.

The jury are instructed that in the computation of the amount of cotton for which defendant is liable they are to take into consideration only such cotton as shall have been satisfactorily proved to them to have been burned at the fire in question, and also to have been held under bills of lading of railroad companies.

53 The court refused to give such instruction; to which refusal the defendant, by its counsel, then and there duly excepted.

The court thereupon instructed the jury as follows:

54 *Charge.*

The rulings of law applicable to the facts of this case were discussed by the counsel and settled by the court on demurrers to the pleadings of the respective parties.

It remains for you to find the facts and fix the amount of the plaintiff's recovery in accordance with the rules to be hereafter stated.

[By an agreement made between the plaintiff and the St. Louis, Iron Mountain & Southern Railway Company and the Memphis & Little Rock Railway Company the plaintiff engaged to insure for said r'y companies, respectively, all cottons stored in the compress sheds and yards of the plaintiff, at the foot of Main street, Little Rock, when the railway companies or either of them should notify the plaintiff of the issuance by them of bills of lading therefor. This agreement was carried out, and on the day of the fire the plaintiff held insurance in various companies, aggregating the sum of $142,500.00, in trust and to indemnify the railway companies against loss or damage by fire of the cotton for which they had issued their bills of lading and which was stored in the plaintiff's sheds and yards described in the policy, at the foot of Main street.

On the 14th day of November, 1887, the cotton thus stored

55 was consumed by fire,] and the two principal questions of fact for you to determine are—

1st. How much cotton covered by the policies mentioned was burned? And,

2nd. What was its value?

It is claimed by the plaintiff that there was burned at the fire in the premises mentioned in the policy 2,670 bales of cotton (excluding 112 bales held for Fred. Hanger, and which has been settled for and is not in this suit) covered by the policies issued to the plaintiff, as set out in its complaint, and that the average value of the

cotton was $50.00 per bale, making the aggregate value of the cotton burned $133,500.00.

The defendant denies that there was that amount of cotton on which bills of lading had been issued or that that amount was burned or that it was of the value claimed.

The plaintiff further claims that the cotton burned for which the Memphis & Little Rock r'y had issued bills of lading was of the value of $57,529.55, and that the value of the cotton burned for which the St. Louis, Iron Mountain & Southern Railway Company had issued bills of lading was $72,737.58.

These claims are also disputed by the defendant.

The owner of property destroyed by fire (in the absence of a stipulation to the contrary) is entitled to recover its market value on the day and at the place it was burned, and that will be your guide in this cause, subject, however, this qualification: [As the plaintiff is a trustee and insured the cotton for the benefit of the railway companies and has no separate claim of its own on the
56 property, it is only entitled to recover an amount equal to its liability to the railroad companies; or, in other words, a sum that will make the railway companies whole for the cotton on which they had issued bills of lading; so that if the market price of cotton produces a larger sum than the aggregate loss of the railway companies (and 2,670 bales at $50.00 per bale, if you should find that was the number of bales and their value, produces an amount slightly in excess of the claims of the railroad companies), then the plaintiff's recovery must be on the basis of latter sum—that is, one that makes the railway companies whole.

In no event is the market value of the cotton to be increased, but it may be reduced by the difference between the value and the amount that will satisfy the just claims of the railway companies.

What amount of cotton was burned for which the railway companies had issued bills of lading and which was covered by policies taken out by the plaintiffs, the value of the same, and the amount of the just demands of the railway companies against the plaintiff for the cotton so burned are questions of fact to be determined by you.]

There were at the time of the fire other policies on the cotton covered by the policy in suit, making, with the policy in suit, an aggregate insurance of $142,500.00. The defendant in this suit is only liable for such proportion of the whole loss as the amount of its policy bears to the total amount of insurance on the cotton. Of course, the defendant is not liable for cotton burned elsewhere than on the premises described in the policy.

The plaintiff is entitled to 6% interest on the sum found due on the policy in suit from the date of suit brought, which is
57 March 30th, 1888.

In coming to your conclusion on the facts you will take into consideration all the facts, circumstances, books, papers, and bills of lading in evidence before you. The plaintiff must satisfy you of its right to recover and of the amount that it is entitled to recover, but the plaintiff does not have to prove its case beyond a reasonable

doubt. If you find the weight or preponderance of evidence is in favor of the plaintiff on material issues, then your verdict should be in accordance with such preponderance of the evidence.

58 The defendant also resists the recovery in this case for the benefit of the Memphis & Little Rock R. R. Co. because it says that the cotton for which it had issued its bills of lading was destroyed by an accidental fire, without any fault on the part of the railroad company, and that the railroad company, not being liable for the destruction of the *company*, therefore the defendant is not liable to the Compress Co. for it.

[This suit is brought on a policy of insurance issued by the defendant's company to the Union Compress Company to indemnify the railroad company for the loss of cotton or for cotton that might be burned after the railroad company issued its bills of lading for it and while it yet remained in the custody of the Compress Co. Now, the Compress Co., under its contract with the railroad Company, is bound to make good by insurance to the railroad company any damages resulting to it from the loss of cotton which the compress Co. held for the railroad company after the railroad company had issued its bills of lading therefor and notified it thereof;] but the defendant in this case says it is not bound, because there is a clause in the bill of lading issued to the effect that the railway company is not bound or liable for the cotton destroyed by

59 fire after issuing bills of lading for it or while it is in its possession; but the railroad company cannot make a stipulation whereby it can take goods to be shipped, and that it shall not be liable for their loss by its negligence. It may stipulate that it shall not be liable for loss without any negligence, but it cannot stipulate that it shall not be liable for its own negligence; that the law will not permit it to do. It is for you to determine whether this railroad company was not guilty of negligence and was not at fault in leaving this cotton in an exposed condition after it issued bills of lading therefor. I may here read to you, gentlemen, as a part of my charge, something that I have used in a case heretofore: "The bills of lading were not procured by the shippers in the expectation that the cotton would remain stored where the cotton then was; they were taken in the expectation that it would be transported, and the shippers had the right to presume that the cotton had been transported to destination before this fire occurred." That was so in the case in which this was said.

Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed and the length of time it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passageway there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat-house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there—[then, if you say this is not neg-

60 ligence, you excuse this railroad company, and to that extent

will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict, and would not be surprised if I should set it aside; but I will leave it for you to say.]

"To which instructions of the court the defendant at the time excepted, and particularly to that part of said instructions which relates to the question of negligence on the part of the Little Rock and Memphis R'y Co. and inclosed in brackets, and to that part relating to the Compress Co. being trustees for the railroads, and included in brackets."

Wherefore said defendant prays that this bill of exceptions may be signed, sealed, and made a part of the record roll in said case named in the caption, which is accordingly done.

(Signed) HENRY C. CALDWELL, *Judge.*

Which citation is as follows:

61 The United States of America to the Union Compress Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein The California Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the district court, this 8th day of December, A. D. 1888.

{The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.}

HENRY C. CALDWELL.

Service acknowledged.
Dec. 8, 1888.

U. M. ROSE,
G. W. CARUTH,
B. S. JOHNSON,
For Union Compress Co.

62 And on December 13, 1888, as follows:

UNION COMPRESS COMPANY
v.
CALIFORNIA INSURANCE COMPANY.

Comes the defendant, by E. W. Kimball, Esq., its attorney, and files herein its bond for appeal, which is approved by the court.

Which bond is as follows:

In the Circuit Court of the United States for the Eastern District of Arkansas, W. Division.

UNION COMPRESS CO. *v.* CALIFORNIA INS. CO.

Whereas a judgment has been rendered in the circuit court of the United States for the eastern district of Arkansas in favor of said compress company and against said insurance company for the sum of $9,491.96, debt or damages, and costs, $42.66, from
63 which judgment said insurance company has appealed by bill of exceptions and writ of error to the Supreme Court of the United States: Now, the said insurance company, as principal, and Logan H. Roots, as surety, are hereby bound to said plaintiff in the sum of nineteen thousand dollars that said insurance company shall prosecute said appeal with effect, and shall well, truly and promptly pay such judgment as the Supreme Court shall render against it.

Witness our hands and seals this — day of December, 1888.

INSURANCE COMPANY OF CALIFORNIA,
By EBEN W. KIMBALL, [SEAL.]
Its Att'y-in-Fact.
LOGAN H. ROOTS, [SEAL.]
(*Wells, Fargo & Co.*)

Logan H. Roots, being duly sworn, says that he is worth twenty thousand dollars over and above all debts and exemptions and subject to execution in Arkansas.

LOGAN H. ROOTS.

Subscribed and sworn to before me this 10th day of December, 1888.

Witness my name and notarial seal.

HORACE KIMBALL,
Notary Public.

64 Endorsements: I think this bond is good. Geo. W. Caruth. The above bond is accepted. U. M. & G. B. Rose.

65 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this fourteenth day of December, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth.

{The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.}

RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 1453. The California Insurance Company, plaintiff in error, *vs.* The Union Compress Company. Filed December 17, 1888.

Supreme Court of United States. Oct. T., 1888.

CALIFORNIA INS. Co., Pl't'ff in Error, *vs.* UNION COMPRESS CO. } No. 1453.

Because of error in transcribing record in case it is agreed that the transcript of record may be amended by striking out the fourth and fifth lines of page 44 of printed record, and that in the same place may be inserted the following:

"To which instructions of the court the defendant at the time excepted, and particularly to that part of said instructions which relates to the question of negligence on the part of the Little Rock and Memphis R'y Co., and inclosed in brackets, and to that part relating to the Compress Co. being trustees for the railroads, and included in brackets."

And the clerk may include in brackets that part of the charge of the circuit court which commences on line 25 and ends on line 39, on page 41 of printed record; also commencing at the words "as the plaintiff," on line 15, and including the word "you," on line 36 of said record, on page 42; and commencing at line 11, on page 43, and extending to line 20 to the word "but" on said page; and commencing on line 30 of page 43 at the words "then, if you say," to the end of the charge, on page 44.

U. M. ROSE,
For Defendant for Error.
EBEN W. KIMBALL,
For Pl'ff in Error.

[Endorsed:] 1453. Cal. Ins. Co., pl'ff in error, *vs.* Union Compress Co. Agreement to correct record. Sup. Court U. S., Oct. term, 1888. No. 1453. The California Insurance Co., pl'ff in error, *vs.* The Union Compress Company. Stipulation to correct record. Filed Jan'y 4, 1889.

Assignment of Errors.

In the Supreme Court of the United States.

CALIFORNIA INSURANCE CO., Pl't'ff in Error,
vs.
THE UNION COMPRESS COMPANY.

1. The court erred in overruling defendant's motion to strike out certain specified parts of the complaint.
2. The court erred in overruling the defendant's demurrer to the substituted complaint and certain parts thereof.
3. The court erred in sustaining the demurrer to the seventh paragraph of the answer.
4. The court errer in sustaining the demurrer to the eighth paragraph of the answer.
5. The court erred in admitting evidence, on the part of the plaintiff, tending to prove that the policy in suit was issued for the benefit of the railway companies, and in pursuance to contracts made by the plaintiff and the railroad companies over defendant's objection.
6. The court erred in permitting the plaintiff to introduce evidence to show that the railroad companies paid the Compress Co. 13 cents per hundred for compressing the cotton, and that such charge covered the compression of the cotton, loading it on cars, and insuring it for the benefit of the railroads, over the defendant's objection.
7. The court erred in permitting the plaintiff to introduce evidence to show that the custom and contract between the Compress Co. and the railroads were known to shippers and to the defendant company by statements to its agents when the policy was applied for that it was to cover the interests of the railroads, over defendant's objection.
8. The court erred in permitting the plaintiff to prove that claims had been presented to the Missouri Pa. R'y and partly paid and partly audited, and amounting to $72,735.58 or any other sum for cotton burned by this fire, over defendant's objection.
9. The court erred in permitting the plaintiffs to prove that claims had been presented to the Little Rock & Memphis R'y and not paid to the amount of $57,529.55 or any other sum by owners of cotton burned, over defendant's objection.
10. The court erred in refusing to permit the defendant to prove at the time of the fire that there were 2,172 bales of cotton destroyed and covered by the policy in this suit, then insured and covered by marine policies by the owners thereof over defendant's objection.
11. The court erred in ruling that if the defendant did not read all of Fink's deposition the plaintiff might read the balance.
12. The court erred in striking out the deposition of Lawrence Phillips over defendant's objection.
13. The court erred in refusing to give the first instruction asked by the defendant.

14. The court erred in refusing to give the second instruction asked by the defendant.

15. The court erred in refusing to give the third instruction asked by the defendant.

16. The court erred in refusing the fourth instruction asked by the defendant.

17. The court erred in refusing to give the fifth instruction asked by the defendant.

18. The court erred in refusing to give the sixth instruction asked by the defendant.

19. The court erred in refusing to give the seventh instruction asked by the defendant.

20. The court erred in refusing to give the eighth instruction asked by the defendant.

21. The court erred in refusing to give the last instruction asked by the defendant.

22. The court erred in giving its charge to the jury, and especially in giving those portions of the charge which are enclosed in brackets, to the giving of which the defendant at the time excepted, and his exceptions duly allowed.

Wherefore the defendant prays that the judgment herein may be reversed.

E. W. McGRAW,
EBEN W. KIMBALL,
For Pl'ffs in Error.

[Endorsed:] 1453. Assignment of errors. Sup. Court U. S., Oct. term, 1888. No. 1453. The California Insurance Co., pl'ff in error, *vs.* The Union Compress Company. Assignment of errors. Filed Jan. 4, 1889.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1,453.

THE CALIFORNIA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNION COMPRESS COMPANY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Statement of Case.

The action is upon a policy of insurance issued by the plaintiff in error to the defendant in error, on the second day of November, 1887.

The date is material. The insurance was for thirty days "against all direct loss or damage by fire" in the sum of $10,000 "on cotton in bales, their own or held by them in trust or on commission, while contained in the frame shed 112 to 122 inclusive, "and in brick shed and yard 115 to 123 inclusive, North Main street "and on platforms adjoining, and in street immediately between "the sheds, Sanborn's Map of Little Rock, Ark.; and it is agreed "and understood to be a condition of this insurance that this policy "shall not apply to or cover any cotton which may at the time of "loss be covered in whole or in any part by a marine policy; and "it is further agreed to be a condition of this policy, that only actual payment by bank check, or otherwise, for cotton purchased, "shall constitute delivery of cotton from the seller to the buyer, "and it is further agreed, that this company shall be liable for "only such proportion of the whole loss, as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of the fire; and it is further agreed, that tickets, "checks or receipts delivered to bearer, shall not be considered as "evidence of ownership. Other insurance permitted without notice until required." (Transcript, p. 7.)

There are other portions of the policy which are material, and which will be cited hereafter.

The complaint alleges the policy; that the Union Compress Company was, during the life of the policy, engaged in the business of compressing cotton; that on November 14, 1887, it had on hand

[This paragraph of the answer was demurred to by plaintiff on the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the Court, and defendant excepted. (Tr., p. 19, folio 18; p. 22, folio 24.)]

The eighth paragraph alleged that after the said railroads had issued their bills of lading, and before and at the time of said fire said cotton was kept in a grossly negligent manner in a dangerous public place, without being covered and sprinkled, and but a few feet from the railroad track of the Missouri Pacific and St. Louis, Iron Mountain & Southern R. R., where locomotives were constantly passing, emitting sparks, by which sparks the fire was kindled. That said fire occurred in broad daylight, about four o'clock P. M., and could by the use of ordinary care have been extinguished by said railroad companies.

[This paragraph of the answer was also demurred to by plaintiff on the ground that it did not state facts sufficient to constitute a defense—the demurrer was sustained and defendant excepted.]

The answer further alleged that at the time of the fire there was a total insurance on the cotton of $250,000, and that by the terms of its policy it was liable only for its proportionate amount of the entire insurance.

The answer denied that the loss was occasioned by the negligence of the Little Rock & Memphis Rail Road, its servants, agents or employees.

On the hearing of the motions and demurrers aforesaid the policy sued on was by agreement considered as part of the complaint, and as on file under the statutes of Arkansas. (Tr., p. 22, folio 24.)

The trial was by jury.

The plaintiff, to sustain the issues on his part, offered evidence tending to prove that the policy sued on was taken out by plaintiff for the benefit of the railway companies named in the complaint, in pursuance of the contracts and agreements between the plaintiff and said companies alleged in the complaint. To all of which evidence defendant at the proper time and in the proper form objected on the ground that the same was incompetent and in contradiction of the terms of the policy. The objections were overruled and defendant excepted. (Tr., p. 22, folio 25.)

Plaintiff next offered evidence tending to prove its course of business; that it was a compressor of cotton at Argenta, opposite Little Rock. That it received cotton for compression both at Argenta and at the premises described in the policy at Little Rock, for which it issued receipts—red receipts at Argenta, and green receipts at Little Rock. The blank form of receipt appears in bill of exceptions (Tr., p. 23.); filled out, one would read thus:

"Little Rock, Arkansas, Nov. 1, 1887.

"Received by the Union Compress Company. From John Smith. Account of John Doe. For Compression. Storage after ten days will be charged. Not responsible for any loss by fire. Marks X, Y, Z. No. of bales of cotton, 65.

"RICHARD ROE,
"Superintendent."

The holders of such receipts took them to the freight offices of

one or the other of the two railway companies, the Missouri Pacific Railway Co. and the Little Rock & Memphis Rail Road Co., and the companies issued their bills of lading for the cotton, specifying the number of bales of cotton, the marks, consignee and destination. The same bills of lading covered cotton at Argenta and cotton at Little Rock. The forms of the bills of lading appear in the transcript. The Mo. Pac. R'y issued one form; the Memphis & L. R. R. R. issued two forms.

Each of the forms by its terms exempted the carrier from liability for loss by fire.

It was provided in each that as the cotton must pass through the custody of several carriers, that the remedy for loss or damage should be against that carrier only, in whose actual custody the property was at the time of the happening of the loss.

The Mo. Pac. R'y Co. reserved the right to compress all cotton signed for in its bills of lading. The M. & L. R. R. did not reserve that right. But the M. & L. R. R. stipulated in its foreign bill of lading for the benefit of any insurance that may have been effected on the goods. (Tr., p. 28, sec. 3.) There were five of these foreign bills of lading issued, covering one hundred and fifty-eight bales of lost cotton. (Tr., p. 34, fol. 37.) Bills of lading covering 1,460 bales of cotton, alleged to have been burned, were issued by the Missouri Pacific Railway Co. (Tr., p. 32.) The loss claimed on behalf of said Company was for 1,463 bales. (Tr., p. 34, fol. 35.) The bills of lading issued by the M. & L. R. R. Co. were for 992 bales (tr., p. 33), but the loss claimed was for 1,211 bales. (Tr., p. 34, fol. 36.) By the bills of lading issued by the Mo. Pac. R'y on the lost cotton 884 bales were covered after November 2nd, the date of the policy sued on; by those proven to have been issued by the M. & L. R. R., 255 bales were covered after the date of the policy.

Upon the issue of the bills of lading the respective railway companies notified the plaintiff of their issue and ordered the cotton therein designated to be compressed at Argenta. The transportation from Little Rock to Argenta was on the track and cars of the Mo. Pac. R'y Co. The M. & L. R. R. Co. had no track and ran no cars near the premises described in the policy. The plaintiff, the Union Compress Co., paid the Mo. Pac. R'y Co. an agreed price for the transportation of said cotton from Little Rock to Argenta. After arrival at Argenta cotton was compressed by the U. C. Co. and then loaded by them on the cars of such of the two railroad companies as its marks and the bills of lading called for.

Plaintiff also offered evidence tending to prove that by agreement between the said Compress Company and railroad companies the former charged and collected from the latter thirteen cents per hundred pounds for all cotton compressed by them, which charge was by agreement intended to cover, and did cover, the compression of cotton, the loading of the same on the cars at Argenta, and the cost of insuring said cotton for the benefit of the railroad companies, which evidence was in proper form and at proper time objected to by defendant on the ground that it was immaterial, irrelevant and incompetent. The objection was overruled and defendant excepted. (Tr., p. 31, fol. 31.)

It also offered evidence tending to prove that the contracts and custom of business before stated was well known to shippers and to defendant, when the policy was issued; "it having been stated to "the agents of the defendant by an officer of the plaintiff when the "policy was applied for that it was intended to cover the interests "of the plaintiff and of the railway companies."

This evidence was also objected to by defendant. Objection overruled and exception taken. (P. 33, fol. 34.)

Plaintiff further proved that in October and November, 1887, there was an accumulation of cotton at the premises described in the policy, owing to the fact that the Mo. Pac. Ry. Co. was short of cars. That the cotton sheds were open sheds, and at the time of the fire, full of cotton, without tarpaulin or other cover, which was stored within three or four feet of the track of the Mo. Pac. R'y. Co., over which locomotives and trains passed several times daily. That after the sheds were full, the cotton was stored in the street, leaving a passage way some four feet wide for foot passengers. Also, that the Mo. Pac. and M. & L. R. R. Cos. had no control over the cotton while so stored, and could not obtain actual possession thereof until the Mo. Pac. Ry. had transported the same to Argenta. But the Mo. Pac. R'y. could take the cotton at any time across the river for compression.

Plaintiff further offered evidence tending to prove that claims had been filed against the Mo. Pac. R'y. Co. by owners of 1,463 bales of cotton burned, of the claimed value of $72,735.58, of which since the commencement of this action, said company had paid $65,000, and had adjusted and would pay the balance. To which evidence defendant objected as immaterial, irrelevant and incompetent. Objection overruled and defendant excepted.

Plaintiff also offered evidence tending to prove that like claims had been filed against the M. & L. R. R. Co. for 1,211 bales of the claimed value of $57,529.55, no part of which had been paid; that suits were pending on several such claims. To which evidence defendant objected on the ground that it was incompetent, irrelevant and immaterial. Objection was overruled and defendant excepted.

Defendant on its part offered competent evidence tending to prove that at the time of said fire, 2,172 bales of the cotton covered by the bills of lading aforesaid, and alleged to have been burned at the fire in question, and of the value of $101,973.73, were covered by marine policies of insurance issued to the respective owners of said cotton residing in various portions of the United States and England. All of which evidence was objected to by plaintiff as immaterial and irrelevant, and on the ground that the insured knew nothing of said policies and had no interest in them. The objection was sustained by the Court and defendant excepted.

Defendant then offered in evidence the deposition of Lawrence Phillips, who testified that he was chief clerk for Ralli Bros. and Galati & Co. That he had charge of their account of cotton shipped at Little Rock in October and November, 1887; that 158 bales shipped by Galati & Co. to Ralli Bros. on the M. & L. R. R. Co. was burned at the fire in question. That it was all fully insured in marine companies,—one-half in the Ins. Co. of North America,

one-fourth in the Sea Ins. Co. of England, one-fourth in Marine Ins. Co. of London.

The policies were not attached to the deposition.

William Bowen testified that he was employed by defendant to procure the deposition aforesaid, and other depositions. That he was informed that the original policies were in Liverpool; that the agencies of the English companies in N. Y. refused to furnish copies of their policies. That the Ins. Co. of North America furnished Phillips with what purported to be a copy of its policy, but Phillips refused to attach it to his deposition.

Whereupon plaintiff moved to strike out all the testimony of Phillips, to the effect that 158 bales of said Ralli cotton was fully covered by marine policies, as incompetent, it being an attempt to prove the contents of written instruments, which motion was granted by the Court, and defendant excepted.

Defendant then offered in evidence proof of loss furnished by defendant to plaintiff, June 26, 1888. (This action was commenced March 30, 1888. On June 25th defendant filed an answer. On July 24, defendant was by the Court allowed to amend its answer, but on condition that it should elect between defence of want of proof of loss and other defences. On Oct. 16, amended answer was filed, and on Nov. 20, plaintiff is granted leave to file substituted complaint and then defendant filed answer.)

The proof of loss alleges destruction at the fire of 2,687 bales of cotton in addition to what is known as the Hanger cotton.

Alleges that the cotton was held in trust or on commission, that is to say, to be compressed, by the U. C. Co., and that it was the property of various persons, the U. C. Co. being interested to the extent of the charges. The names of consignees, no. of bales and value pertaining to each consignee was given. The loss was claimed to be $130,037.93.

No allusion was made in proofs of loss to any interest of the railroad companies.

The testimony being closed, certain instructions were asked by defendant and refused, and certain instructions given which were excepted to, which will fully appear in the assignment of errors following.

Assignments of Error.

1st. The Court erred in overruling defendant's motion to strike out specified portions of the complaint.

2nd. The Court erred in overruling defendant's demurrer to the substituted complaint and specified portions thereof.

3rd. The Court erred in sustaining the demurrer of plaintiff to the seventh paragraph of defendant's answer.

4th. The Court erred in sustaining the demurrer of plaintiff to the eighth paragraph of defendant's answer.

5th. The Court erred in admitting certain evidence on behalf of plaintiff, which said evidence and the ruling of the Court thereon is set out in the bill of exceptions as follows, to wit: (Tr., p. 22, folio 24.)

"The plaintiff to sustain the issues in said case on its part to be

" sustained, offered evidence tending to prove that the insurance " policy sued on was taken out by the Union Compress Company for " the benefit of the railway companies named in the substituted com- " plaint, and in pursuance of contracts and agreements between said " Union Compress Company and said railway companies by which " the former agreed to take out such insurance—to all of which evi- " dence the defendant, at the proper time and in proper form, ob- " jected, upon the ground that the same was incompetent, and that " such evidence was in contradiction of the terms of the written " policy of insurance sued on, which objection was overruled by the " Court, to which ruling the defendant, by its counsel, then and there " duly excepted."

6th. The Court erred in admitting certain evidence on behalf of plaintiff, which said evidence, and the ruling of the Court thereon is set out in the bill of exceptions as follows, to wit: (Trans., p. 31, fol. 31.)

" Plaintiff also offered evidence tending to prove that by agree- " ment between the said Compress Company and the railroad com- " panies, the former charged and collected from the latter thirteen " cents per hundred pounds, for all cotton compressed by them, " which charge was by agreement extended (intended?) to cover and " did cover the compression of the cotton, the loading of the same " on the cars at the latter place (Argenta), and also the cost of in- " suring said cotton for the benefit of the railroad companies; to " which evidence defendant at the proper time, and in proper form, " duly objected, on the ground that the same was immaterial, irrele- " vant and incompetent; which objection was overruled by the " Court; to which ruling defendant, by its counsel, then and there " duly excepted."

7th. The Court erred in admitting certain evidence on behalf of plaintiff, which said evidence and the ruling of the Court thereon is set out in the bill of exceptions as follows, to wit: (Trans., p. 33, fol. 34.)

" It (plaintiff) also offered evidence tending to prove that the " contracts and custom of business before stated, was well known " to shippers and to defendant, when the policy sued on was " issued, it having been stated to the agents of defendant by an " officer of the plaintiff, when the policy was applied for, that it was " intended to cover the interests of the plaintiff, and of the railway " companies.' Defendant objected to the admission of this evi- " dence, but its objection was overruled, to which ruling defendant " at the time excepted."

8th. The Court erred in admitting certain evidence on behalf of plaintiff, which said evidence and the ruling of the Court thereon is set out in the bill of exceptions as follows, to wit: (Trans., p. 34, fol. 35.)

" Plaintiff further offered evidence tending to prove that claims " had been filed against the Missouri Pacific Railway Company by " the owners of fourteen hundred and sixty-three bales of cotton " burned at said fire, of the claimed value of seventy-two thousand " seven hundred and thirty-five dollars and fifty-eight cents; that " since the commencement of this action, said railway company had

" paid such claims to the amount of sixty-five thousand dollars, and " that the balance had been adjusted by said company, and would be " paid; to which evidence the defendant objected, on the ground " that it was irrelevant, immaterial and incompetent, which objec- " tion was overruled by the Court, to which ruling defendant, by " its counsel, then and there duly excepted."

9th. The court erred in admitting certain evidence on behalf of plaintiff, which said evidence and the ruling of the court thereon is set out in the bill of exceptions as follows, to wit: (Tr., p. 34, fol. 36.)

" Plaintiff further offered evidence tending to prove that claims " had been filed against the *Little Rock & Memphis* Railroad " Company by the owners of twelve hundred and eleven bales of " cotton burned at said fire, of the claimed value of fifty seven thou- " sand five hundred and twenty-nine dollars and fifty-five cents, no " part of which had been paid by said Company, though suits had " been brought *in* (on?) several of the claims and were still pend- " ing, to which evidence defendant objected on the ground that it " was incompetent, irrelevant and immaterial. The Court overruled " said objection, to which ruling defendant by its counsel then and " there duly excepted."

10th. The Court erred in sustaining the objection of plaintiff to certain evidence proffered by defendant, which proffer and the ruling of the Court thereon is set out in the bill of exceptions as follows, to wit: (Tr., p. 35, fol. 38.)

" Defendant to sustain the issue on its part offered competent " evidence tending to prove that at the time of said fire two thou- " sand one hundred and seventy-two bales of cotton, covered by the " bills of lading aforesaid and alleged to have been burned at the " fire in question, and of the value of one hundred and one thousand " nine hundred and seventy-three dollars and seventy-three cents, " were at the time of said fire covered by marine policies of insur- " ance, theretofore issued to the respective owners of said cotton " residing in various portions of the United States and in England; " all of which evidence was by the plaintiff at the proper time and " in proper form duly objected to, on the ground that the same was " immaterial and irrelevant, and on the ground that the insured " knew nothing of said policies and had no interest in them. The " said objection was sustained by the Court, to which ruling of the " Court defendant by its counsel then and there duly excepted."

11th. The Court erred in granting motion of plaintiff to strike out evidence of Lawrence Phillips offered on behalf of defendant. The said evidence and the ruling of the Court thereon are set out in the bill of exceptions as follows, to wit: (Trans., p. 36, folio 43.)

" Defendant then offered in evidence the deposition of Lawrence " Phillips, who testified that he was chief clerk for Ralli Bros. and " Galati & Co.; that he had charge of their accounts of cotton ship- " ped at Little Rock *to* (in?) October and November, 1887, and that " one hundred and fifty-eight bales shipped by Galati & Co. to Ralli " Bros. *in* (by?) the *Little Rock & Memphis Railroad Company* (M. & " L. R. R?) in said months were burned at this fire; that all of this " cotton was fully insured in marine companies—one-half in Insur-

"ance Company of North America; one-fourth in Sea Insurance "Company of England; one-fourth in Marine Insurance Company "of London. The policies of insurance mentioned in said deposi- "tion were not attached thereto.

"In connection with said deposition, defendant offered the testi- "mony of William Bowen, a witness on the stand; that he was em- "ployed by defendant to procure said deposition and others; that "at the time of taking said deposition, said Phillips promised to "procure copies of the policies named by him, but afterward re- "fused to furnish the same, that witness was informed that the ori- "ginal policies were in Liverpool, and that it was necessary to pro- "cure copies of such policies from the offices of the respective "insurance companies in New York; that the Insurance Company "of North America furnished said Phillips with what he said was a "copy of its policy, but said Phillips refused to attach it to his "deposition; that the Sea Insurance Company of England, and the "Marine Insurance Company of London, refused to furnish said "Phillips with copies of *these* (their ?) policies.

"Whereupon, counsel for plaintiff moved the Court to strike out "all the testimony of said Phillips, to the effect that said one hun- "dred and fifty-eight bales of said Ralli cotton was fully covered "by marine policies, as incompetent, it being an attempt to prove "the contents of written instruments; which motion was granted by "the Court, to which ruling of the Court, defendant, by its counsel, "duly excepted."

12th. The Court erred in refusing to instruct the jury, at request of defendant as follows, to wit: (being instruction numbered I., on page 37 of transcript.)

"The policy of insurance of defendant, on which the action is "brought, covered all goods in possession of the Union Compress "Company, at the place designated in the said policy at the date "when said policy was issued, which were held by the said Union "Compress Company under warehouse receipts issued to the own- "ers of said cotton by said company, and also all cotton subse- "quently and during the life of the policy so received by the Union "Compress Company.

To which refusal defendant duly excepted.

13th. The Court erred in refusing to instruct the jury, at request of the defendant as follows, to wit (being instruction numbered II., on page 37 of transcript):

"The policy in question, insures the goods of the Union Com- "press Company at the place designated. It also insures the Union "Compress Company to the extent of its liens upon or charges "against all goods held by it during the life of the policy, not its "own, but held by it in trust or on commission. It also insures "the interest of the owners of the legal title to such goods so held. "It does not insure any one else. Any possible interest of any "common carrier, not the owner of the goods, or any of them in "the place designated, is not insured by said policy."

To which refusal defendant duly excepted.

14th. The Court erred in refusing to instruct the jury at request

of defendant as follows, to wit (being instruction numbered III., on page 39 of transcript):

"The jury are instructed to disregard all evidence in the case "tending to show that the insurance in question was issued for the "benefit of any railroad company not an owner of any of the goods "destroyed by fire, for the value of which recovery is sought "herein."

To which refusal defendant duly excepted.

15th. The Court erred in refusing to instruct the jury at request of defendant as follows, to wit (being instruction numbered IV., on page 39 of transcript):

"The policy in question provides that it shall be void if "there be any change in the possession of the insured property, "except under circumstances which have no bearing on this case. "If the jury believe from the evidence, that after the policy in "question was issued, any common carrier with the knowledge and "consent of plaintiff, and under agreement with plaintiff, issued its "bills of lading for any of the cotton which at the date of the policy "was, or thereafter came into, the possession of plaintiff, the issu-"ance of such bills of lading under the conditions of the policy, "avoided the policy as to all cotton covered by such bills of lad-"ing."

To which refusal defendant duly excepted.

16th. The Court erred in refusing to instruct the jury at request of defendant as follows, to wit (being instruction numbered VII., page 40 of the transcript):

"The plaintiff herein can recover for no cotton not included in its "proofs of loss, nor for the interest of any party which interest is "not covered by proofs of loss."

To which refusal defendant duly excepted.

17th. The Court erred in refusing to instruct the jury at request of defendant as follows, to wit (being instruction numbered VIII., on page 40 of transcript):

"As this action is brought solely on behalf of the railroad com-"panies, on account of liability incurred through carelessness of "the agents and servants of the companies, no cause of action ac-"crued against the defendant until the actual payment by said "companies of damages on account of the alleged fire, and the re-"covery cannot be greater than the value on November 14, 1887, at "Little Rock, of the cotton so burned and paid for; nor greater "than the sum paid by the railroad companies—that is, if they have "paid more than the value of the cotton, they cannot recover the "excess from defendant; if they have paid less than the value, they "can recover only to the extent of the payment."

To which refusal defendant duly excepted.

18th. The Court erred in charging the jury as follows: (Tr., p. 41, fol. 54.)

"By an agreement made between the plaintiff and the St. Louis, "Iron Mountain & Southern Railway Company and the Memphis "& Little Rock Railway Company the plaintiff engaged to insure "for said railway companies, respectively, all cottons stored in the "compress sheds and yards of the plaintiff, at the foot of Main

"Street, Little Rock, when the railway companies, or either of "them, should notify the plaintiff of the issuance by them of bills "of lading therefor. This agreement was carried out, and on the "day of the fire the plaintiff held insurance in various companies, "aggregating the sum of $142,500, in trust, and to indemnify the "railway companies against loss or damage by fire of the cotton for "which they had issued their bills of lading and which was stored "in the plaintiff's sheds and yards, described in the policy, at the "foot of Main Street."

To which charge of the Court the defendant duly excepted.

19th. The Court erred in charging the jury as follows: (Tr.. p. 42, fol. 56.)

"As the plaintiff is a trustee and insured the cotton for the benefit "of the railway companies, and has no separate claim of its own on "the property, it is only entitled to recover an amount equal to its "liability to the railroad companies, or in other words, a sum that "will make the railway companies whole for the cotton on which "they had issued bills of lading; so that if the market price of cot-"ton produces a larger sum than the aggregate loss of the railway "companies (and 2,670 bales at $50 per bale, if you should find that "was the number of bales and their value, produces an amount "slightly in excess of the claims of the railroad companies) then "the plaintiffs recovery must be on the basis of the latter sum— "that is one that makes the railway companies whole. In no event "is the market value of the cotton to be increased, but it may be "reduced by the difference between the value and the amount which "will satisfy the just claims of the railway companies. What amount "of cotton was burned for which the railway companies had issued "bills of lading and which was covered by the policies taken out "by the plaintiffs, the value of the same and the amount of just de-"mands of the railway companies against the plaintiff for the cotton "so burned, are questions of fact to be determined by you."

To which charge defendant excepted.

20th. The Court erred in charging the jury as follows, to wit: (Tr., p. 43, fol. 58.)

"This suit is brought on a policy of insurance issued by the de-"fendant's company to the Union Compress Company to indemnify "the railroad company for the loss of cotton, or for cotton that "might be burned, after the railroad company issued its bills of "lading for it, and while it yet remained in the custody of the Com-"press Company. Now, the Compress Company under its contract "with the railroad company is bound to make good by insurance "to the railroad company any damages resulting to it from the loss "of cotton, which the Compress Company held for the railroad "company after the railroad company had issued its bills of lading "therefor and notified it thereof."

To which charge defendant duly excepted.

21st. The Court erred in giving the following instruction to the jury, and especially in that portion thereof which is italicized: (Tr., p. 43, fol. 59.)

"Now, you have heard the testimony, gentlemen, with reference "to the situation under which this cotton was placed, and the

" length of time it remained there. If you think there is no negli-
" gence on the part of the railroad company" (referring to the M.
& L. R. R. Co.), " then you will find that the railroad company is
" not liable for the cotton. If you can say that that was a proper
" place to store cotton, and that leaving a passage way there of not
" exceeding four feet up and down, through which persons passed
" at all hours of the day and night to the boat house and skiff ferry,
" and it being a dry season, with three or four thousand bales of
" cotton stored there—*then, if you say this is not negligence, you excuse*
" *the railroad company, and to that extent will disallow the claim of the*
" *plaintiff. But, if you should so find, I would be very much surprised*
" *at your verdict, and would not be surprised if I should set it aside; but*
" *I shall leave it for you to say.*"

To which instruction, and especially to the italicized portion thereof, defendant duly excepted.

ARGUMENT.

May it please the Court:

The questions presented by the record in this case, if not altogether novel, at least arise under circumstances and in a form, which give to them a semblance of novelty.

The questions are important to insurers and insured; the amount at stake is a very considerable sum of money, as the liability of insurers not parties to this action, arising out of the same loss, will be determined by the adjudication in this case.

While we trust that we may not exceed the bounds of moderation, in our occupancy of the time of the Court, we fear that in the presentation of our views, we will not be able entirely to harmonize our wish to be concise, with our duty to make a full exposition of the grounds on which we seek a reversal of the judgment of the Court below.

Different assignments of error present substantially the same questions, and will, therefore, be argued together.

I.

Assignments 1, 2, 5, 6, 7, 8, 12, 13 and 14, involve the discussion of the questions, What does the policy of insurance mean? Is it in any way ambiguous? Is parol evidence admissible to explain it?

The plaintiff in its complaint, is not content with the usual form of complaints in actions of this character, alleging the policy, compliance with its terms by plaintiff, the insurable interest of plaintiff, the loss, the damage and refusal to pay. In addition to allegations of all the foregoing matters, and also of the fact of additional insurance in other companies, the complaint contains averments as follows: (Trans., pages 5 and 6.)

" That at the time that said cotton came to the possession of the
" plaintiff, it was engaged in the business of compressing cotton at
" its compress, in the town of Argenta, opposite Little Rock, and

" on the north side of the Arkansas River, and that said cotton was
" deposited with the plaintiff for compression by various owners
" thereof, who delivered the same at the sheds and yards, and adja-
" cent grounds in the said city of Little Rock, as described in said
" policy, with directions that the same should be transported to
" said compress by the plaintiff or some carrier employed for that
" purpose by it; and that on the receipt of any bales of said cotton
" by said plaintiff, it gave a receipt for the same to the owner thereof,
" and that, according to a custom known to said depositors, to the
" plaintiff, and to the St. Louis, Iron Mountain & Southern Railway
" Co., and the Missouri Pacific Railway Co., of which it was a part,
" and the Little Rock & Memphis Railroad Company, which were
" common carriers, having and operating railroads of which both
" Argenta and Little Rock were stations, said owners transferred
" said receipts to either one or the other of said carriers, and re-
" ceived from said carriers bills of lading for the transportation by
" said carriers of said cotton to various places to which said cotton
" was then and there shipped by said owners, with an agreement
" with said railroad companies, that said cotton should not be shipped
" until it had been compressed by the plaintiff. There was a stand-
" ing and continuing agreement between said plaintiff and said rail-
" way companies, that the plaintiff should proceed to compress said
" cotton, and all cotton thus received, and should insure the same,
" after notice of the execution of said bills of lading by said railway
" companies, against loss by fire during the time that said cotton
" should be in the hands of the plaintiff for the purpose aforesaid,
" for a price averaging from sixty to sixty-five cents per bale, to be
" paid by said railway companies, respectively, when said cotton
" should be compressed and delivered to said railway companies on
" their cars at Argenta for transportation under said bills of lading,
" at which time said carriers should surrender to plaintiff the said
" receipts issued as aforesaid, at the time that said cotton was de-
" posited with the plaintiff for compression by the owners, as above
" stated; that all of said cotton was in the custody of plaintiff at the
" time of said loss under and by virtue of said custom and agree-
" ment, and that it was lost by the negligence of the servants, agents,
" and employees of said railway companies; and that since said loss
" said St. Louis, Iron Mountain & Southern Railway Company has
" been sued in this court by two of said consignees for the value of
" part of said cotton above named, to wit, the York Manufacturing
" Company and Hazard & Chapin; and said railroad company de-
" fended said actions on the ground that said loss was not occasioned
" by the negligence of said railway company, or its servants and
" employees, and on a trial of said first-named cause, it was adjudged
" by this Court, that said York Manufacturing Company and said
" Hazard and Chapin recover from said railway companies, the
" value of said cotton sued for as aforesaid, and that since said ad-
" judication, said railway company has paid said judgment, and the
" value of a large part of the cotton for which it had issued bills of
" lading as aforesaid, and that several suits are now pending in this
" Court against said Little Rock & Memphis Railroad Company,
" brought by the consignee of portions of said cotton, for the recov-

" ery of damages for the loss of said cotton by reason of the negli-
" gence of said railroad company, which said suits are now pending
" and undetermined.

" On said 14th day of November, 1887, the plaintiff had in its
" possession, at its sheds and premises above mentioned, for pur-
" poses of compression, a large amount of cotton, to wit, over 3,000
" bales; that of this number 2,700 bales of cotton were held by this
" plaintiff for the St. Louis, Iron Mountain and Southern Railway
" Company, and the Little Rock & Memphis Railroad Company.
" By said contract and agreement between plaintiff and said rail-
" roads, this plaintiff took out the policies of insurance above set
" out, for the purpose of indemnifying this plaintiff against loss and
" liability, and the said railroad companies against loss and liability
" by reason of the destruction of said cotton while it was being held
" by plaintiff for purposes of compression. The St. Louis, Iron
" Mountain & Southern Railway has been adjudged as aforesaid,
" to pay a large sum of money, to wit, $———, and, in addition, has
" paid a still larger amount because of its liability for such loss,
" amounting in all up to this date to $72,209.58, and has made de-
" mand therefor against the plaintiff for reimbursement of said
" losses."

We moved to strike out the matter quoted, as immaterial and irrelevant (Tr., p. 16, fo. 15, and p. 22 fo. 23). The denial of this motion is our first assignment of error.

We also demurred to that matter, on the ground that the facts stated do not tend to constitute a cause of action (Tr., p. 17, fo. 16, and p. 20, fo. 22). The overruling of the demurrer constitutes our second assignment.

On the trial plaintiff was permitted to introduce evidence tending to prove some of the allegations of that portion of its complaint. The admission of that evidence constitutes our 5th, 6th, 7th and 8th assignments.

At the close of the testimony we asked of the Court instructions, that, if given, rendered the previous rulings of the Court respecting that portion of the complaint harmless to us. The refusal of those instructions constitutes our 12th, 13th and 14th assignments.

The policy, as we have already shown, insured the plaintiff "against all direct loss and damage by fire," "on cotton in bales, their own or held by them in trust or on commission," while contained, etc., etc. (Tr., p. 7.)

It will be seen that the complaint is brought, and the action was tried on the theory that the words "their own, or held by them in trust or on commission" in this policy of fire insurance, are the exact equivalent of the words "on account of whom it may concern" in a policy of marine insurance.

But plaintiff in error claims that these words have a well understood, well defined signification, and that

The beneficiaries under the policy, are the owners of the cotton; the possible interest of no common carrier is covered thereby; the policy is not ambiguous, and parol testimony is inadmissible to aid in its in erpretation.

The law of marine insurance affords a very unsafe guide to the determination of rights under a policy of fire insurance.

A party suing upon a marine policy, and imbibing his ideas of the law of representation and concealment solely from adjudications in fire cases, would meet with many embarrassments. An adjuster who should attempt to adjust and settle a fire loss on the basis of the law adapted to marine insurance would surely commit grievous errors.

These contracts of insurance, generally designated as Fire and Marine, while they have some points in common, have a different ancestry; the law as to each is peculiar to itself; the points in which the contracts and the construction of them differ are nearly as numerous as those in which they agree.

The term "on account of whom it may concern" is of American origin, originated in policies of marine insurance, and is still generally confined to such policies. In Massachusetts, and perhaps one or two other states, it has been to a limited extent engrafted on policies of fire insurance.

Marine Insurance comes from the Civil Law, the rules of which to the present day, enter into the construction of its policies.

Originally in England marine policies were frequently, if not commonly, issued in blank, leaving it to the person procuring the insurance to insert the name of such beneficiary as he pleased. When not in blank they were almost equally indefinite as to the identity of the assured. In 1705, during the reign of Anne, a common form of marine policy is given as follows: Dominion and Laws of the Sea, pub. London 1705, p. 660–3.

"In the name of God, amen. A B of London, merchant, *as well "in his own name as for and in the name and names of all and every "other person and persons, to whom the same doth, may or should ap-"pertain in part, or in all, doth make assurance, and causeth himself "and them, and every one of them to be assured.*"

In England, at the present day, the issue of policies in blank is prohibited, and the form of policies is, to a large extent, regulated by statute, yet the English policy of to-day in the respect now under consideration, except that "Be it known that" is substituted for "In the name of God, amen," is identical with that of the time of Queen Anne. (Newson's Shipping and Marine Ins., p. 229.)

The term "for account of whom it may concern" is yet a stranger to English policies. It is the brief American substitute for the lines of the Queen Anne policy above quoted, which lines were in themselves a declaration of the existing doctrine, that the person obtaining the insurance could fill in the name of the beneficiary at

his leisure, and that it was a matter which in no way concerned the insurer.

When the term "for whom it may concern" was first inserted in a policy of marine insurance, it is not easy exactly to determine, nor is it very material.

In 1815 the Supreme Court of Massachusetts said of a policy to "A. B., Agent," written in 1809, "a policy written in the old form "as well in the plaintiff's own name as for and in the name and "names of all and every other person or persons, to whom the same "may appertain, etc., would have better expressed the intent of the "parties. But that form has been disused in this State for twenty "years past and probably was not familiar to the broker nor to any "one of the parties concerned."

Davis *v.* Boardman, 12 Mass., 85.

In answer to a bill in chancery, the Boston Marine Ins. Co. asserted that the old form was abandoned by Boston companies at least a year prior to 1800.

Graves *v.* Boston Mar. Ins. Co., 2 Cranch., 419.

The old form appears in New York in 1801 in Lawrence *v.* Leber, 2 Caines, 206, and in the Sup. Court of the United States, in 1809, in Hodgson *v.* Marine Ins. Co., 5 Cranch., 100.

The present substitute appears in a policy issued at Providence, R. I., in February, 1814, in report of Seamans *v.* Loring, 1 Mason, 120, and it may possibly appear in earlier cases. It attracted no particular notice and was the cause of no especial discussion. It was merely a substitute for a more lengthy form of expression, rights under which had been frequently adjudicated, and all the old cases were precisely applicable to the new form.

As under the common law an interest in the thing insured was not necessary to a recovery on a policy of marine insurance, it was so immaterial for whom the insurance was intended, that the policies were issued in blank, to be filled by the broker or other person with the name of the party intended to be benefited, so under the English clause after the statute prohibiting wagering policies, it was held that the only questions to be determined were, who were the persons intended to be benefited by the persons procuring the insurance and did such persons have an insurable interest. 1 Arnould on Ins., 111. Almost any possible interest may be covered by that clause. In fact, it is as liberally construed as the blank wager policies, of which it is an outgrowth, with the single exception that some kind of interest must be proven as a basis of recovery. The rules for the construction of policies "for whom it may concern" are precisely the same. Adjudications upon policies "as well in his own name, etc.," are authority upon questions arising under policies "for whom it may concern."

Thus the early cases of Seaman *v.* Loring, 1 Mason, 128, and Buck *v.* Chesapeake Ins. Co., 1 Pet., 151, as to policies for whom it may concern, were governed entirely by the prior adjudications under the old form of policy, without a question by Court or Counsel of their application.

We see then that marine insurance, "for whom it may concern"

as it exists at the present day is the natural outgrowth of a loose system of underwriting, which originated at a time when the business itself was looked upon as little different from gambling, and when, in fact, it was to a very great extent neither less nor more than wagering.

But the business of fire insurance has no such history. It had its origin under the common law, in 1667, after the great fire in London, and from its inception was strictly a contract of indemnity. During the first seventy-nine years of its existence the Courts of England upheld the validity of wager policies of marine insurance. While the statute prohibiting wager policies of marine insurance was passed in 1736, no such statute applicable to fire insurance was passed until 1774.

Yet before that time Lord Chancellor King and Lord Chancellor Hardwicke had recorded their opinions, that on a policy of fire insurance there could be no recovery without proof of interest.

4 Bro., P. C. 431, Ed. Toml.
Sadlers Comp. *v.* Badcock, 2 Atkyns 554.
Ellis on Ins., 21–22.

There is no warrant from the common law for wager policies of fire insurance. (Wood on Ins., 337.)

From the inception of the business, the personality of the assured has been a prominent matter for consideration, and the "moral risk" has been deemed a matter of the utmost importance. "A marine policy is most commonly general in its terms, comprehending in its indemnity all who are interested in the subject of insurance; while the fire policy limits its protection to those who are specially named in it." (Flander's Fire Ins., p. 82.)

"Although by the custom of marine insurance policies are transferable freely with bills of lading, yet policies of *fire* insurance have never been so regarded, and the interest in them cannot be transfered from one to another without the consent of the office." (Angell on Fire Ins., Sec. 11.)

With this wide difference in the history and customs of marine and fire insurance it is not surprising to find in the adjudications concerning the latter, that the question "who was the assured" assumes a prominence that it does not attain under policies of marine insurance.

An insurance on "goods, their own or held by them in trust or on commission" is of American origin, and was an innovation on the accustomed manner of doing a fire insurance businesss. The form probably made its appearance in policies some years before it appears in the reports.

The earliest case in which any question arose concerning its effect was Parks *v.* The General Interest Assurance Co., 5 Pick., 37, decided in the year 1827. Owing to the stipulation under which it was submitted, the case is of little importance. The insured, a commission merchant, took out insurance in that form, representing to the company that he was in the habit of making advances on consignments, and wished to obtain the policy to protect himself against loss on such advances. By stipulation the representation

was made part of the case, and was to be considered in connection with the policy, for the purpose of ascertaining the true meaning and construction of the contract. The question was whether the insurance covered the interests of the owners. The Court held that under the representation made part of the case, the policy covered only the interest of the assured to the extent of his advances, and expressly disclaimed an intention to pass upon the question, whether such representations would have been admissible in evidence, except by agreement of parties.

In 1828 this form of insurance was considered with relation to its validity and effect, and the doctrine established which has ever since been recognized as governing that class of contracts.

De Forest *v.* Fulton Fire Ins. Co., 1 Hall, N. Y., 134.

The general form of the English marine policy "as well in his own name as for and in the name of" etc., etc., and its American prototype "for whom it may concern" had been upheld on the ground of a supposed personal relation of agent and principal between the person procuring the insurance and those for whose benefit the insurance is intended—a relation arising out of a contract express or implied between the parties. The agent need never have seen the subject of insurance. In fact it was commonly taken out by an insurance broker, and frequently on a ship at sea or on goods at the antipodes. Any one with express authority might procure such insurance, but authority would not be implied to every one; e. g., not to a ship's husband on behalf of the owners; nor to a ship master on behalf of the owners of freight; nor to a part owner on behalf of a co-owner.

1 Parsons Mar. Ins., 49.

The authority of the bailee to insure goods held in trust or on commission is by the decision of De Fores *v.* Fulton Ins. Co. based on no personal contractual relation between the person procuring the insurance and the intended beneficiaries. The right to effect such insurance attaches to, and is inseparable from, the *possession* of the goods by the person procuring the insurance. The rightful possession of the bailee gives him the privilege, while it does not impose an absolute duty, to protect the goods while in his hands, and for the benefit of the *owner*, by the ordinary precaution of insuring them. It is a privilege based on the possession of the goods, and has never been held to protect the interest of any but the bailee effecting the insurance, and that of the legal owner of the goods. The *possession* which gives this right to insure to the bailee is not necessarily the actual *custody* of the goods. He may have them stored in some other person's warehouse and still have the right to insure them. The right to procure a policy of marine insurance for whom it may concern, rests upon the personal relation of the agent to his principal. The right to procure a policy of fire insurance on goods "his own or held by him in trust," grows out of the relation of the bailee to the goods which some one else owns.

As possession of the subject of insurance adds nothing to the right to procure a policy for whom it may concern so express au-

thority from the owner adds nothing to the right, derived from possession of the property, to insure goods held in trust. As the latter form is dependant for its existence on possession by the bailee, it necessarily follows that one bailee cannot procure such insurance for the benefit of another bailee. The insurable interest of each being derived from possession, it could not exist in both at the same time.

Insurance in this form has invariably been held to insure—first, the bailee to the extent of his liens or advances, and second, the *owner* of the goods. The varied interests in goods which may exist without property therein, have never been held covered by the form of insurance under consideration.

In this particular policy the words "their own" and the words "or on commission" may be eliminated, as it is an established fact that the Union Compress Company neither owned any of the cotton burned or held any of it on commission. For all purposes of this case the insurance was upon cotton in bales held in trust by the Union Compress Co., at the place designated in the policy.

That the words "in trust" have not a technical meaning is admitted.

The trust referred to is not of the kind usually treated of in works on Trusts and Trustees.

The words, "held in trust by them" are defined as goods of which they had the care and custody, intrusted to them as representatives of others, and for which they are responsible *to the owner*.

Stillwell *v.* Staples, 19 N. Y., 401.
Waring *v.* Indemnity Ins. Co., 45 N. Y., 606.

Of late years policies on goods held in trust and on commission have become very common. The Courts of the United States, of very many states, and of England and the English colonies have been called upon to interpret them, and we do not think it will be possible to find any case in which it has been held that any person other than the owner of the legal title to the goods at the time of loss, was the beneficiary under such a policy—except that the insured himself is a beneficiary to the extent of his advances or legal charges.

Mr. Woods, in his discussion of this subject, continually alludes to the owner and never to any one else as the beneficiary under such policies, thus (I Woods on Ins., p. 668) "the cases have gone to the "extreme length of holding that any person lawfully in possession "of the property may insure the property in his own name for the "benefit *of the owner* * * and may recover as trustee for the "real *owner*, etc." And again on same page "a policy drawn so as "to cover property held 'in trust,' and with the evident purpose of "covering interests other than those of the assured himself, may "be enforced for the benefit of the *owner* of the property, etc." And on pp. 669 and 670 "In such cases the terms 'held in trust' or "'on commission' and kindred terms, in a policy to an agent, factor "or the like, have been held as giving to the *owner* of the property "the right to take the place of the assured," etc., etc.

And on pp. 671–672, "It may sometimes be quite important in

" determining whether goods are held 'in trust' within the meaning " of the term to look at the real understanding of the parties and " their real legal relation: in a word, whether the assured holds the " position of trustee or purchaser of the property. This will de- " pend upon the question whether the *owner* has a right to require " the re-delivery of the property itself," etc., etc.

It was said by this Court in Home Ins. Co. *v.* Baltimore Warehouse Co., 95 U. S., 543.

" It is undoubtedly the law that wharfingers, warehousemen and " commission merchants having goods in their possession may in- " sure them in their own names, and, in case of loss, may recover " the full amount of insurance, for the satisfaction of their own " claims first, and hold the residue for *the owners*. Such insurance " is not unusual, *even when not ordered by the owners of goods, and* " *when so made it enures to their benefit.*"

In London & Northwestern Railway Co. *v.* Glyn, (1 Ell. & Ell., 452) and quoted with approval in above case, on p. 545, the Court of Queen's Bench held that the insured under such policy was a trustee for the *owners*.

In Robbins *v.* Fireman's Fund Ins. Co., 16 Blatch, 131, the Court says: " The plaintiff's policies upon the Watch Company's property " present the ordinary case of insurance by a factor, of goods in his " possession belonging to another person. Such insurance either " directly or indirectly enures to the benefit of the *owner*. In this " case the insurance was directly for the benefit of the owner *as the* " *factors had no charges or liens upon the goods.*"

And to same effect are

Siter *v.* Morrs, 13 Pa. St., 218.
Lee *v.* How. Fire Ins. Co., 11 Cush., 324.
Phœnix Ins. Co. *v.* Favorite, 49 Ill., 259.
Home Ins. Co. *v.* Favorite, 46 Ill., 370.
Budelman *v.* Powell, 10 Mo. Ap., 280.
Thomas *v.* Cummiskey, 108 Pa. St., 361.

The policy is without ambiguity, and no evidence was admissible to prove that railroad companies, and not the owners of the cotton were intended as beneficiaries.

The subject matter of the insurance is definitely described. It was all the cotton held by the Union Compress Company in trust, at the place designated in the policy. We have shown by an unbroken series of decisions that the term " in trust " has acquired an established definition, in view of which contracts of insurance are entered into. It is held by the Courts, and is known to factors, carriers, and other bailees, that the beneficiary of such insurance is the *owner* of the goods. There is nothing then ambiguous about the policies, which calls for any explanation whatever.

True, the amount of cotton that was on the premises, its value and the *names* of the owners are not specified, and they can be established only by evidence. But evidence can go no farther.

"Blanket and floating policies are sometimes issued to factors or "to warehousemen, intended only to cover margins uninsured by "other policies, or to cover nothing more than the limited interest "which the factor or warehouseman may have in the property "which he has in charge. In those cases as in all others, the sub- "ject of the insurance, its nature and its extent are to be ascertained "from the words of the contract which the parties have made.

"It is as true of policies of insurance as it is of other contracts, "that except when the language is ambiguous, the intention of the "parties is to be gathered from the policies alone. There are cases "in which resort may be had to parol evidence to ascertain the sub- "ject insured, but they are cases of latent ambiguity. 'So in the "construction of other contracts parol evidence is admissible to ex- "plain such ambiguities. In this particular the rule for the con- "struction of all written contracts is the same. Lord Mansfield "said long ago that Courts are always reluctant to go out of a policy "for evidence respecting its meaning, and so are the authorities "generally. It is no exception to the rule, that when a policy is "taken out expressly "for or on account of the owner" of the sub- "ject insured, or "on account of whomsoever it may concern," evi- "dence beyond the policy is received to show who are the owners, "and who were intended to be insured thereby. In such cases the "words of the policy fail to designate the real party to the contract, "and, therefore, unless resort is had to extrinsic evidence there is "no contract at all:

Home Ins. Co. *v.* Balt Warehouse Co., 93 U. S., 541.

The attempt to prove in an action for the enforcement of a policy, and not for its reformation, that the parties intended to enter into a contract different from that which the words of the contract import, is clearly inadmissible.

It was so held in cases arising out of policies of insurance in

Lamott *v.* H. R. Mut. Ins. Co., 17 N. Y., 199—note.
Ewer *v.* Wash Ins. Co., 16 Pick., 502.
Finney *v.* B. C. Ins. Co., 8 Metc. (Mass), 348.
Lippincott *v.* La. Ins. Co., 2 La. (O. S.), 399.
Ill. Mut. F. Ins. Co. *v.* O'Neill, 13 Ill., 89.
Holmes *v.* Charleston M. F. Ins. Co., 10 Metc., 211, 43 Am. Dec., 428.
Cheriot *v.* Barker, 2 John, 316, 3 Am. Dec., 437.

And when, as in this case, words in a policy have received a judicial interpretation, parol evidence is not admissible to show that the words were used by the parties with an intent different from the legal construction of the words used.

It was said by Bosworth, J., in Bargett *v.* Orient Mut. Ins. Co., 3 Bos., 397, "Independent of other objections to the evidence offered to show the meaning of the words 'free from average,' it is sufficient to say that evidence of such a character is not admissible for the purpose of attaching to those words, when forming part of a written contract, a meaning in conflict with or variant from that

given to them by adjudged cases, by which their meaning in precisely such contracts has been determined and was a point in judgment."

The attempt to prove an intention differing from that which the words of the policy import, has been frequently a matter of adjudication, and the adjudications are harmonious. Such attempt does not meet the approval of and is not sanctioned by the Courts.

Thus, in Connecticut, where a policy was issued to trustees of an insolvent railroad company on property of the company, it was held that evidence was inadmissible of an intent that the insurance should cover a personal interest of the assured arising out of a lien on the insured premises.

Bishop *v.* Clay Ins. Co., 45 Conn., 455.

And in Alabama where the children of the assured were named as beneficiaries in a policy of life insurance, it was held incompetent to prove by parol an intention to include a grand child.

Russell *v.* Russell, 64 Ala., 500.

And in Maine where a life policy was made payable to the widow of assured, it was held incompetent to prove that a woman with whom he had cohabited for many years, but who was not his wife, was the person intended.

Bolton *v.* Bolton, 73 Me., 399.

And in Massachusetts under a policy of marine insurance on advances, it was held incompetent to prove an agreement and intention to insure "out fits" as well.

Burnham *v.* Boston Mar. Ins. Co., 139 Mass., 399.

And where cattle were insured from damage by "a sea," it was held in New York incompetent to prove an intent that those words apply only to shipments on deck.

Snowden *v.* Guion, 101 N. Y., 459.

So where a life policy was payable to the personal representatives of assured, held in North Carolina, that it was incompetent to prove an intention that the payment was to be to certain of the children.

Elliott *v.* Whedbee, 94 N. C., 115.

Applying these principles to the language of the policy in question, and we having already seen that insurance on goods held in trust, is an insurance for the benefit of the owners of the goods, it would seem necessarily to follow that evidence of an intention to effect the insurance for the benefit of one who was not the owner of the goods is inadmissible. Far from explaining the policy, it would contradict it. Evidence as to who are the owners of the goods is admissible and explanatory. It is in harmony with the policy and makes it effective.

In Elliott *v.* Whedbee, *supra*, it was competent and necessary by evidence to identify the persons who were the payees of the policy under the designation "personal representatives" of the assured,

but it was incompetent to prove that persons who were not personal representatives were intended to be payees.

In Bolton *v.* Bolton, it was competent to prove who was the widow designated as payee—incompetent to prove that a woman other than the widow was intended.

In Russell *v.* Russell, the children of the assured who were beneficiaries could be identified by evidence, proof of an intention to include one who was not one of the children was inadmissible.

In this case it is relevant to prove who were the owners of the cotton—the beneficiaries of these policies; it is incompetent to prove that a railroad corporation, not an owner of the cotton was intended as the beneficiary. Such proof would make a contract for the insurance company which it never executed; a contract imposing a more onerous liability than by its policy it assumed; a contract which would deprive it of the valuable right of recourse upon the carrier by whose negligence the loss occurred.

We have said that the words of the policy are free from ambiguity as to the subject of the insurance and the parties to be benefited thereby.

In this case, there is no question that all the cotton held by the Compress Company at the place named in the policy was insured, but there has been some difference of opinion, whether like words necessarily import an insurance of all the goods which answer to the description, or whether the bailee may not show that it was his intention to insure the goods of some of his customers, and that he did not intend to insure for others.

In Lee *v.* Adsit, 37 N. Y., 83, the Court expressed its opinion obiter, that in a suit on the policy in a case where a factor had like goods belonging to different owners, it would be competent to prove that it was intended that the policy should protect only the goods of particular owners.

It was not an action against an insurance company, but against a factor who had collected insurance on goods, his own, or held by him in trust, etc., and was brought by the owner of some of the property destroyed for his share of the proceeds, and the decision went, upon the ground that whatever might be the rule in an action on the policy, in an action between third parties evidence was admissible to show the real intent, though in contradiction of the policy.

In Snow *v.* Carr, 61 Ala., 367, which was (as was the case of Lee *v.* Adsit, 37 N. Y., *supra*) an action brought by an owner of goods against a bailee, for a portion of the insurance received by the latter on goods held in trust, it was held that it was not error to admit parol evidence of the intent of the insured as to which of the various owners of goods in his possession, were to be covered by the policy. The case refers to a previous case of Snow *v.* Stontz, which also was not an action on the policy, in which it was held error to reject such evidence. We do not find the latter case reported.

The Supreme Court of Alabama, without alluding to the grounds of the decision of Lee *v.* Adsit, follows that case.

The question of ambiguity of these words "their own, or held by them in trust," was directly brought in question, before the Courts of

Maryland, under circumstances that necessitated the application of the same rules of construction as if the action had been brought on the policy containing them.

Hough *v.* People's Fire Ins. Co., 36 Md., 393.

The case is interesting and instructive. It is noteworthy as being the first case in which the question came squarely before the Court, whether an insurance of this kind covered all the goods to which the description of the property insured was applicable, and whether it was competent to show an intent different from the intent which was the legal conclusion from the language of the contract. It was a case in which a very considerable amount of money was involved, was thoroughly and ably argued on both sides by the best legal talent of Maryland, and the decision of the Court appears to have been rendered only after careful consideration of all points in issue. The case arose out of the same state of facts as appeared in the case of Home Ins. Co. *v.* Balt. Warehouse Co., reported in 93 U. S., 527, and is in fact in all essential particulars one of the branches of that case. The facts and issues as presented to the Maryland Court were as follows: On June 21st, 1870, the People's Fire Ins. Co. insured Hough Clendening & Co., against loss or damage by fire to the amount of $1,400 on fifteen bales of cotton stored in warehouse of Baltimore Warehouse Co. Loss payable to Baltimore Warehouse Co., which, as the evidence showed, had made advances. On June 27th, 1870, a like policy was issued by same company to same assured, payable as above, for $1,100 on thirteen bales of cotton stored as above.

On December 7th, 1869, the Home Insurance Company had issued its policy to the Baltimore Warehouse Company insuring them to the amount of $20,000 on merchandise, their own, or held by them in trust, or in which they have an interest or liability, stored as described in foregoing policies.

On October 29th, 1869, the Associated Fireman's Ins. Co. had issued to the Baltimore Warehouse Company, a similar policy to the last foregoing in the sum of ten thousand dollars.

All four policies above named were in force at the time of the fire.

One of the defences of the People's Fire Ins. Company to this action in the Maryland Court, was that the last two policies above named, were contributory policies, and that The People's Co. was liable, if at all, only for its proportion of the loss.

It seemed to be conceded by plaintiff, that the policies in question, on their face, sustained the claim of defence which was made, and that it devolved upon him affirmatively to rebut it. This, he attempted to do by offer of testimony from competent witnesses on the stand, to the effect that the last two policies above named, were not intended to cover any of the goods of Hough Clendenning & Co., or any interest of theirs. The evidence was excluded by the *nisi prius* Court.

Evidence was offered by competent witnesses to prove express notice to Hough Clendening & Co. by the Baltimore Warehouse Company, that the latter would not insure the cotton of the former, and that they must insure it for themselves.

The proffered evidence was excluded.

Also evidence was tendered of competent witnesses that at the time the last two policies (above named, prior in point of time) were taken out, the Baltimore Warehouse Company notified the insurers that the insurance desired was to cover cotton only not covered by policies taken out by depositors.

The proffered evidence was excluded.

In the Court of Appeals the rulings of the *nisi prius* Court were in all respects sustained, that Court holding that "where a contract is reduced to writing and is concluded in plain and unambiguous language, Courts must look to it alone to find the intention and meaning of the parties, and parol proof is inadmissible. Also that the last two policies above named were free from ambiguity, and that proof of an intent different from that which was to be drawn from their language was inadmissible. Held also that the last two policies above named attached by their terms to all the goods held in trust by assured in the place named and were contributory to the two policies first above named.

This case was decided in 1872. In 1876 this Court was called upon to determine the respective liabilities arising from the same loss, and under similar conditions of insurance. And this Court held that the proper construction of the language of the Home Insurance Company "on merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in," etc., was definite as to the property insured. The Court says "There is nothing ambiguous in the description of " the subject insured. It is as broad as possible. The subject was " merchandise stored or contained in a warehouse. It was not " merely *an interest in that merchandise.* The merchandise of the " warehouse company, owned by them, was covered, if any they " had. So was the merchandise in the warehouse in which they " have an interest or liability. And so was any merchandise which " they held in trust." And it was further held that by force of the language in the policies the said policy of the Home Ins. Co. and the policies of the People's Co. before mentioned, and other like policies were contributory.

Home Ins. Co. *v.* Balt. Warehouse Co., 93 U. S., 542.

In the later case of Lucas *v.* Insurance Company, decided by the Supreme Court of Appeals of West Virginia in 1883—the Court *obiter* said: "In the Alabama case (Snow *v.* Carr), the Court also " permitted parol evidence to be heard on the question what goods " were intended to be included in the phrase, 'their own or held in " trust.' In this respect this case is in conflict with the Maryland ' decision (Hough et al. *v.* People's Fire Ins. Co.), and although " the determination of the case before us would not be affected " whether we follow the rule laid down in the Maryland case or in the " Alabama case, yet I will say that it does seem to me that the rule " laid down in the Maryland case is the only safe one.

"I cannot see how we can hold words constantly used in policies, " and which have received a uniform and certain construction as am-

" biguous, or how we can permit any parol evidence to be heard in " putting a construction on such words."

Lucas *v.* Ins. Co., 23 West Va., 274.

In that case it was held that by the terms of the policy an insurance to a music dealer on his stock, his own or held by him in trust or on commission, was *ex vi termini* an insurance for the benefit of the owner, on a piano left with the assured to be forwarded to New York for repairs.

Upon the only point as to which it has ever been intimated that these policies are ambiguous, we submit that the great weight of authority determines them to be absolutely without ambiguity.

As to the parties beneficially interested in these policies, there never has been any difference of opinion which has received judicial expression. The language of the Courts and text writers is uniformly the same, the owners of the goods are the beneficiaries of the insurance.

We submit that these cases fully sustain and to the utmost limit, the doctrine on which we rely. They affirm the principle that a policy on goods held in trust is essentially different in its nature and results, from one for whom it may concern. The distinction drawn is the more marked, because the leading case in the United States, as to the construction of policies for whom it may concern arose in the same Court which decided Hough *v.* People's Ins. Co. We refer to Newson *v.* Douglas, 7 Harris & J., 450, on which the Court of Appeals of Maryland in 1826 construed such a policy precisely as if it had been written in the old English firm "as well for himself as all others" &c,, and held that a policy for whom it may concern; applies to the interest of the parties, and only them, for whom it is intended by the person who effects the insurance. But testimony as to the intention of the person who effected the insurance was the exact testimony which was rejected as incompetent under a policy on goods held in trust, in Hough *v.* People's Fire Ins. Co.

Our argument thus far has been as to the effect of the language " their own and held by them in trust," etc., without reference to qualification of such words by other provisions of the policy. It is manifest that there might be such additional language used as would import to those words a signification entirely different from that which, standing alone, they import. For example, the words " loss payable to A. B. on his interest as chattel mortgagee, which interest only is covered by this insurance" would, without doubt, exclude the owner from participating in the results of the insurance. In this policy, however, the additional language used is such as to confirm the natural and legal signification of the words used and to demonstrate that the parties contracted with reference to that very signification.

A special provision in this policy, which does not occur in the ordinary printed blanks of policies, and which has *ex industria* been inserted herein is the following " it is agreed and understood to be a condition of this insurance that this policy shall not apply to or

cover any cotton which may at the time of loss be covered in whole or in part by a marine policy, and it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased, shall constitute delivery of cotton from the seller to the buyer, * * * * and it is further agreed that tickets, checks or receipts delivered to bearer shall not be considered as evidence of ownership."

This provision, so far as it relates to the consequences of obtaining marine insurance, is not, under our construction of that provision, especially significant. As will be seen hereafter, we claim that marine insurance taken out by the owners avoids the policy, whether the policy be for the benefit of the owners or the railroads.

The plaintiff below, however, claimed that marine insurance taken out by the owners does not affect this policy if taken for the benefit of the railroads.

If that claim be valid, then the clause as to marine insurance becomes of itself a very efficient argument against the position that the policy *was* issued for the benefit of the railroads. On this question the argument trenches on another point in the case. It is sufficient to say at present that there was no probability of a carrier by land taking out an insurance on goods to be carried by water, and that *ex necessitate* the marine policies referred to were to be taken by others than the railroads. The claim then of the plaintiff below is, that the evidence admitted by the Court to the effect that railroad companies were beneficiaries, had also the effect to emasculate the clause concerning marine insurance, or, in other words, that the ruling of the Court below permitted the plaintiff in that Court to introduce evidence dehors this insurance contract, the effect of which was to destroy all significance of a provision inserted *ex industria* therein. We submit that the claim of the plaintiff is demonstrative of the error of the Court in admitting the evidence.

The other provisions as to what should constitute change of ownership of the cotton, and in what manner it should be evidenced are full of meaning if we consider that the persons to be benefited in case of loss were those who *owned* the cotton. They were wise and prudent provisions to prevent litigation, to enable the company in case of loss to procure legal evidence of the *ownership* of the cotton at that time, and to pay the loss to, or on behalf of the persons entitled thereto. But if we suppose this contract was intended for the benefit of the R. R. Co.'s, then all these provisions as to the ownership of the cotton become at once without any materiality whatever. In the settlement of any liability which might be incurred on account of the fire by the R. R. Co., these provisions would have as much and as little influence as a chapter in Deuteronomy.

Again, it is provided with respect to proofs of loss (Tr., p. 14), that "In case of loss on property held in trust or on commission, " or if the interest of the assured be other than the entire and sole " ownership, the names of the respective *owners* shall be set forth " together with their respective interests therein."

If a railroad company were the beneficiary of the policy, it is not easy to appreciate the value to the company of information as to the

owners of the cotton. There is no provision that the company shall be informed of the name of the *carrier* interested.

As in the policy under review in Home Ins. Co. *v.* Balt. Warehouse Co., this insurance is on *property* and not on an interest in property. Like that, this policy contains the provision that in case of loss or damage to the *property* insured the company may replace the articles lost or damaged with others of the same kind and quality. (Tr., p. 8, line 9.)

The policy also contains a clause providing for subrogation in case loss is caused by negligence of any person or corporation. (Tr., p. 10 and 11.)

The whole tenor of the policy from beginning to end fortifies the definition we claim for the words "their own or held by them in trust."

The full bearing of some of the clauses we have cited will appear in a discussion of the evidence as a whole, and such discussion would not be pertinent to the assignments of error now under consideration.

If then we are correct in these positions, the matter contained in the complaint, to which we have excepted, was immaterial and irrelevant, and should have been stricken out; it did not tend to constitute a cause of action against us, and our demurrer should have been sustained; it was incompetent to prove the facts alleged, and our objection to evidence should have been sustained. The instructions asked by us correctly stated the law, and should have been given.

II.

The assignments of error to which we next invite the attention of the Court are intimately connected with those we have just submitted. The assignments are those numbered 15, 18, 19 and 20, and relate to the charge of the Court. Assignment 15 is of error in refusal to instruct and the other three of errors in instructions given.

The portions of the charge excepted to are hereinbefore set out in full.

The Court charged the jury without any qualification whatever, that on the day of the fire the plaintiff below held $142,500 of insurance, including that in this policy, in trust to indemnify the railway companies against loss or damage by fire of the cotton for which they had issued their bills of lading and which was in the place described in the policy. It refused to instruct that the issue of bills of lading constituted change of possession under our policy.

The instruction given involved several distinct matters. It was a declaration

1st. That the policy sued on was to protect property held by the assured in trust for the railroad companies.

2nd. That all the cotton, which was at the time of the fire covered by bills of lading of the railroad companies, and was stored at the place described in the policy, was covered by the policy.

3rd. That all such cotton was held by the plaintiff below at the time of the fire.

All three of the above matters were matters in issue, were the

most material matters in the case, and in taking them from the jury the Court virtually took the whole case from the jury.

If we are correct in the assignments of error already argued, under a proper construction of the policy according to its terms, the beneficiary thereof could be none other than the *owners* of the cotton, and the instructions were erroneous.

If we are not sustained in those assignments of error, then the instructions as to all three of the matters above enumerated were upon questions of mingled fact and law.

Our purpose now is, treating them as questions the solution of which might be aided by evidence, to demonstrate that in the light of the facts proven by plaintiff as part of his case, the instructions are still erroneous.

Under the evidence the railroad companies were not and could not be the beneficiaries of the insurance.

1st. This cotton policy which was put in evidence contains an unusual and prominent feature, which is irreconcilable with any intent to insure a carrier against a loss caused by its own negligence. Ordinarily a fire insurance policy runs "against all loss or damage by fire."

May on Insurance, pp. 733 and 737.
Angell on Ins., Appendix, pp. iv, vi.
Hammond on Ins., pp. 171, 173.

But the policy in question is against "all *direct* loss or damage by fire." (Tr., p. 7, top.)

The evidence discloses the fact that all of the bills of lading issued by the railroad companies provided that the carrier should be exempt from loss or damage by fire. (Tr., p. 24, line 4; p. 26, l. 10; and p. 28, l. 9.) The only interest, then, which the common carrier had in this cotton, was a contingent interest, arising from its liability for damages for loss by a fire, occurring through his own negligence.

Now, a *direct* loss or damage by fire is a loss which immediately happens by reason of the bare fact that the goods are burned.

The interest of the railroad companies alleged to have been insured was not such as could possibly have sustained any *direct* loss by fire. A *direct* interest is one which is *certain*, and not *contingent* or doubtful.

Lewis *v.* Post, 1 Ala., 72.

One of the synonyms for "direct," as given by Webster, is "immediate," and in New York, under the statute concerning evidence, it became necessary to determine whether one, who would be a distributee of an estate, was one for whose "immediate benefit" an action brought by the administratrix was prosecuted. It was held that though eventually the distributee might reap a benefit from the successful prosecution of the action, he was not one for whose *immediate* benefit the action was prosecuted.

Butler *v.* Patterson, 13 N. Y., 294.

Now, in the case at bar, the possible loss to the carrier by the destruction of the goods was by no means "direct" in any sense of the term.

It was remote, contingent and conditional. The fire alone could not inflict any loss. Whether the carrier would suffer loss would depend on at least three other contingencies:

1st. Whether or not the negligence of the carrier caused the loss.

2nd. Whether the owner would be able to prove negligence on the part of the carrier.

3rd. Whether the owner was innocent of contributory negligence.

And we may add a fourth one, to wit: Whether the owner makes a claim for loss against the carrier within the statute of limitations.

All four of these contingencies should, and the last three of them must, be resolved against the carrier, before any loss can come to him. If loss does come, the proximate cause thereof is not the fire, but his own negligence; the loss to him results from carelessness.

To the owner of goods a loss occurs immediately upon their destruction. If the cause be fire, that is the proximate cause of loss to him, because the loss would be the same, whether the fire be accidental or caused by negligence, or design, or be as in case of lightning, an act of God. It matters not to the owner, in whose possession the goods may be when burned. His loss is immediate upon their destruction. It arises directly from their destruction. It is a *direct* loss by fire.

Not so with the carriers who come to the front in this action. As they have no property in the goods, the destruction of them does not necessarily affect them. If they have possession of the goods at the time of the loss, they have so protected themselves by contract that their loss is still a matter of indifference, if they have properly conducted themselves. The only pecuniary loss, that can possibly accrue to them, is one which may come in the way of a penalty for their misconduct—civil damages for breach of duty enjoined upon them by law. The same acts or omissions which would render the carrier liable civilly to the owner of the goods destroyed might also subject him to fine or imprisonment, or both. If the latter affliction fell upon him, it certainly would be a misuse of language to say that he was fined and imprisoned because goods not belonging to him were burned. But as the same acts or omissions would be the occasion of the civil damages in which he might be mulcted, why is it not equally a misuse of language to say that the loss in that way sustained, was the *direct* result of the burning of another person's goods?

Under this clause in the policy, the instructions were erroneous even if the insurance was intended for the railroads. We insured only against *direct* loss by fire, and the railroads have met with no such loss.

2nd. Another very serious objection to the claim that this insurance was for the benefit of carriers as to the goods destroyed arises on the record.

The plaintiff below introduced a large number of bills of lading claimed to cover cotton destroyed at the fire alleged in the complaint. The dates of the bills of lading with the number of bales

covered thereby, claimed to be missing, appears in the transcript (pp. 32–33). It appears thereby that the Mo. Pac. R'y. Co. issued 32 bills of lading, covering 1,460 bales of the missing cotton. Of these, it appears that eleven bills of lading covering 531 bales were issued before the date of the policy. One covering 45 bales was issued the same day as the policy and twenty covering 884 bales were issued after the date of the policy.

Of the bills of lading of the Little Rock & Mem. R. R. Co., there are in evidence only twenty covering 992 bales of cotton. Of these, 4 bills covering 255 bales appear clearly to be issued after the date of the policy.

Now, the 1,139 bales on which bills of lading were issued after November 2nd, 1887, were in the hands of the Union Compress Company for a longer or shorter period before the issue of the bills of lading. During that period they were beyond any possible doubt covered by our policy of insurance.

Take for instance, the 205 bales covered by bill of lading of the Mo. Pac. R'y. of November 8. Suppose that they were received by the Union Compress Company on the 3rd.

Can there be any doubt that they were covered by our policy of insurance from November 5th to November 8th? Had they been burned during that time, could the insurance company in any way have escaped payment for their loss, provided the conditions of the policy had been observed? Suppose a fire had occurred on the 7th of November, burning that 205 bales and no other cotton, and action had been brought against the company on its policy. Suppose the company had filed an answer, alleging that it was true, that they issued their policy and got their premium, and supposed they were insuring the owners of the cotton, but in fact, the Union Compress Company, which procured the insurance, did so without any intention of benefiting the owners, but took out the policy in the expectation that at some time or other the cotton would be covered by a bill of lading of the Mo. Pac. R'y. Co., in which event, and in that only, the insurance was expected to attach, and for the benefit of the R'y. Co.

With how much respect would the Court below, or this Court, treat such an allegation of defence? And yet it is precisely that claim to which we are now asked to respond. It is a claim subversive of all rules of fire insurance.

On the face of the policy, the insurance is on cotton held in trust by the Union Compress Company, in a designated place, for thirty days after November 2nd. And yet it is claimed, directly in the teeth of the policy, and contradicting its terms, that this 205 bales, which *was* held in trust by the assured, and *was* in the place described, was *not* covered by the policy until November 8th. If it was covered from the 3rd to the 8th, as it indubitably was, for the benefit of the owners, there is no process known to the law by which the benefit of that insurance could be transferred to the railroad companies, without action by either owner or insurer. That the Union Compress Company did, in fact, intend and understand that this insurance was for the benefit of the owners, is conclusively proven by the practical construction they put upon it after the fire,

and before they learned that most of the owners were protected by policies of marine insurance.

Among the cotton burned was 112 bales belonging to one Fred Hanger which was not covered by bills of lading. (Tr., p. 17, sec. 3 of answer.) The answer alleges that the companies interested paid the plaintiff $4826.59, the full value of that cotton, of which the plaintiff in error here paid its proportion. The total insurance being $142,500, and our policy being $10,000, our proportion was $338.70†. On our policy in evidence is plaintiff's receipt for $338.71, in full payment of their claim for partial loss or damage, dated May 26, 1888. (Tr., p. 16.) In plaintiff's proof of loss the Hanger cotton is mentioned and excepted. (Tr., p. 37, f. 46.) In the charge of the Court (bottom of page 41) it appears that 112 bales of cotton, "*held for Fred Hanger*," had been settled and paid for.

So that it clearly appears that, after the fire, the plaintiff put in a claim on behalf of Fred Hanger, an owner of the cotton, and was paid for it. If the 205 bales which were billed Nov. 8th, had been burned on the 7th, the claim for them would have been on behalf of the owners.

Thus the position of the plaintiff below appears to have been that the insurance was for the owners or the railroads, according to the policy of circumstances.

Chief Justice Marshall remarked of this kind of construction: "It is a good general principle that written agreements ought to be expounded by themselves. But if the same words are to be considered as insuring the interest of Graves only, or the interest of Graves and Barnwall according to extrinsic circumstances, the certainty expected from a written instrument will be very much impaired."

Graves *v.* Boston Mar. Ins. Co,, 2 Cranch., 419.

We submit that the evidence is not only strong but irresistible that this insurance was for the owners, and that the court below, if it assumed to decide the facts for the jury, should have come to a conclusion exactly contrary to that which it announced.

3rd. There is still another feature of the evidence which affords material aid in the demonstration of error in the charge of the Court: By the complaint and the evidence it appears that all this cotton originally came into the hands of the Union Compress Co. Afterward the railroads issued bills of lading on the cotton, some of which were issued before, but more after the policy was issued. Now those bills of lading either changed the possession of the cotton or they did not. If they did, then the cotton at the time of the fire was in the possession of the R. R. Cos., and was not in the possession of the Union Compress Company. The Union Compress Company had ceased to hold it in trust, or at all, and as we insured only the cotton held in trust by the U. C. Co., we are not liable for cotton held by the R. R. Cos. Our policy contains an express provision that any change in the possession without our endorsed consent shall avoid the policy. (Tr., p. 8, 8th line from bottom.) If the bills of lading did *not* change the possession, there could have been no insurance on behalf of the carrier,

because the very foundation and vitality of any right the carrier has to procure insurance directly or indirectly is his possession. His liability to owners is for his negligence as to the goods while in his possession. If he had no possession, he had no right to insure and no contingent liability to loss.

If it be material to decide whether or not the possession was changed by those bills of lading, we submit that it was changed, and that at the time of the fire the cotton was in the possession of the R. R. Cos., and so not covered by our policy. The delivery of the bills of lading was conclusive on the question of the delivery of the cotton.

Kentucky M. &. F. Ins. Co. *v.* West. & Atl. R. R. Co. 8 Baxter, Tenn., 268.

The precise point under very similar circumstances was decided by the Supreme Court of Maryland. That Court held that the issuing of a bill if lading by a transportation company *of goods in warehouse of another company places the goods in the care and custody of the transportation company for purposes of insurance.*

Fire Ins. Asso. *v.* Mchts. and Miners Transportation Co., 66 Md., 346.

We, therefore, respectfully submit that the charge of the Court that at the time of the fire the plaintiff held insurance on cotton covered by bills of lading, was erroneous. Such cotton was not in their possession, and at the time of the fire they had no insurance thereon.

4. Upon one other point in this connection, we ask leave of the Court, to call in question an expression of opinion of this Honorable Court, and to respectfully request that that opinion may be reviewed by this Court.

In Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S., 324, his Honor, Mr. Justice Gray speaking for the Court, said: "No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants."

We have already shown in this case that the insurance, if for the benefit of the railroads, was purely and wholly an insurance against negligence.

We wish, if we may, to argue to the Court that insurance of that nature is contrary to public policy and void. We do so more hopefully because while, in the case cited, the question of public policy may have been involved, it did not, if we may judge by the reported briefs of counsel, assume as much prominence as other considerations of more immediate interest to their clients.

We most respectfully submit that the tendency of this class of insurance would be to foster a gross and often criminal negligence with respect to property and property rights of others, and to jeopardise the safety not only of the goods insured, but of the property of others in proximity thereto.

It has always been held against public policy to permit insurance of the wages of a seaman, on the ground that as freight is the mother of wages, an insurance which should guarantee the earnings of the sailor irrespective of the safety of the ship, would remove one great incentive to exertion for the preservation of the vessel and cargo.

1 Phil. on Ins., Sec. 212. 1 Marsh. on Ins., p. 90. Hughes on Ins., p. 18.

The property interests intrusted to common carriers, result in vast, but constantly changing accumulations of inflammable merchandise, in contiguity to large cities. The protection of great municipalities from disastrous conflagrations, more nearly concerns the policy and welfare of the public, than does the safe arrival of isolated vessels with their freights. If it be against public policy to permit the withdrawal of any incentive to an exertion which might save a ship, how much more is it impolitic to validate a contract of indemnity for carelessness which might destroy a city.

The ordinances of most cities are populous with devices for the prevention of the calamity of conflagration; they search the dwellings of the people and the warerooms of the merchant, inspect the machinery of the factory, and investigate the customs and habits of all who use the element of fire in the conduct of their business. Wherever diligence can discover, or ingenuity surmise a danger from fire, the police power is brought into action, and penal consequences ordained to those who, in construction of buildings, storing of goods, use of their own property, or handling of steam or fire, are guilty of a negligence which, from its disastrous consequences, is a crime against the body politic. This very negligence which it is the aim of legislators to repress, is that which is now proposed to be protected by insurance.

It is true, that ordinarily policies of insurance cover losses arising from the negligence of the assured, but it is also true that no policy was ever issued, which in terms, proposed an indemnity for negligence only, and that ordinarily the insurance runs to some one having a property right in the subject of the insurance considerably exceeding in value the amount of the policy.

One very grave and serious objection which has been urged against the whole business of fire insurance, is that the carelessness and inattention, which security naturally creates even in *owners* of insured property, results in losses to their uninsured neighbors that go far to outweigh, the benefits of the system. (Angell on Ins., p. 41.) It is now proposed to insure those who have no property interest in the thing insured against the non-performance of their duty to be vigilant in guarding the property of others. If such insurance be not against public policy, what objection on that score could be made to insurance to a physician against the results of his carelessness in practice; to a surgeon against the results of his mistakes; to druggists against the consequences of putting up medicines from the wrong jars; to railroads against damages for loss of life and limb, through somnolency of switchman or blunder of conductor?

It may not be grossly impolitic to partially indemnify a man for dam-

age wrought to his own person or property by his own negligence. His self-interest is a counter-check to the evil tendency of such protection. Yet insurance the *sole* object of which would be indemnity to a man for loss by fire of his own property, caused by his own negligence, would stand on a vastly different footing from an insurance, which but incidentally extended protection against such negligence.

It might well be claimed that no person would pay for an indemnity against the results of his own negligence *only*, unless he intended to avail himself of the privilege he paid for, exemption from ordinary care in the protection of his property; and that the moral risk of such insurance rendered it unjust to the community at large. But the insurance now contemplated, we submit, is wholly evil. Indemnity to a man or corporation for damage which may result by reason of his or its negligent conduct towards the persons or property of others, destroys one of the most efficient safe guards of persons and property in a civilized community. The wholesome fear of a judgment for damages is more operative than the golden rule or penal statutes. It is that, which more than ordinances, prevents the dangerous obstruction of our streets and highways; that imposes on those pursuing offensive vocations a decent consideration for the comfort of others; that makes our stages, cars and steamers reasonably safe to life and limb.

It adds skill to the hand of the surgeon; ties the tongue of scandal; consigns libels to the waste basket; induces vigilant supervision of agents and servants, in whose power it lies to incur liabilities which their principals and employers must meet. It is a curb on the malice of the wicked and a spur to the vigilance of the heedless. In every department of life, in every occupation, in all places it is an ever present reminder of obligations to others which law imposes, and the neglect of which it avenges. Without it civilized society would become impracticable.

We most respectfully submit that this kind of insurance is incompatible with a proper regard for the common safety and individual rights. It is a matter of public concern. It is against public policy. "*Tua res agitur, paries cum proximus ardet.*"

But if the impolicy of that kind of a contract would not absolutely avoid it; if, on the theory that this contract is one the beneficiaries of which are to be ascertained by evidence, the uncontroverted facts to which we have called attention, be not so absolutely conclusive as to have made it the duty of the Court to instruct that this policy was *not* for the benefit of the railroad companies, the instructions given were none the less erroneous.

The jury had rights which were infringed. They had a right to consider the dangerous and unusual nature of the insurance claimed by the plaintiff, and with the policy before them to read that provision therein providing for subrogation of the company to the right of the assured to sue the negligent author of the fire for damages; to read that other provision in the policy by which the company undertakes to insure only against *direct* loss or damage by fire; to

read the careful provisions in the policy for the procurement of evidence of the *title* to the cotton; to reflect upon the fact that in the proof of loss it was necessary, under the policy, to set forth the names of the *owners* of the cotton; to propound in their own minds and there seek an answer to the question, "for whose benefit did this insurance exist *before* the railroad companies issued its bills of lading;" to seek and *not* to find an answer to these other queries, "how could the railroad be liable for damages for cotton burned while it was in the possession of the Union Compress Company where the owners had placed it, and how could this insurance company be liable for the loss of cotton burned while in the possession, not of the Union Compress Company, but of the railroad companies;" to attempt a solution of the conundrum exhibited by a bill of lading which changed the possession and did not change it; which for purposes of action by the owners against the railroad companies, placed cotton in the possession of the latter, and for purposes of action by the Union Compress Company against the insurance company, left it with the former.

The jury, we say, on this question of intent in issuing this policy, had a right to consider these and all other matters in evidence, and having duly and carefully weighed them to decide for themselves whether or not this policy was issued on goods held in trust for the R. R. Co.'s by the Union Compress Company, and whether or not the Union Compress Company or the R. R. Co.'s held this cotton at the time of the fire. And the Court had no more right to take those questions from the jury than it had to enter judgment against us without the semblance of a trial.

III.

The next assignment of error which is logically, though not chronologically in order, is that numbered 21st. It relates to the instruction of the Court as to the liability for negligence of the Memphis & Little Rock Railroad Company. The Court recites the facts which in its judgment impute negligence to that company, without any allusion to the other facts which plaintiff in error claims were controlling and disproved negligence, and instructed the jury, as hereinafter set forth. Whether or not the cotton insured was destroyed by the negligence of that railroad company was an issue in the case (answer, p. 19, subdivision 10). The facts were by the Court brought to the attention of the jury as follows:

"If you can say that that was a proper place to store cotton, and "that leaving a passage way there of not exceeding four feet up "and down, through which persons passed at all hours of the day "and night to the boat-house and skiff-ferry, and it being a dry "season, with three or four thousand bales of cotton stored there, "then if you say this is not negligence, you excuse this railroad "company and to that extent will disallow the claim of plaintiff; "but if you should so find, I will be very much surprised at your "verdict, and would not be surprised if I should set it aside, but I "leave it for you to say." (Tr., pp. 43–44.)

When a Court instructs the jury as to facts, its narration of, or

allusion to, facts should be fair. It should not select and dwell on isolated facts which might be construed favorably to one side, and make no allusion to other facts which might militate against that side.

Evans *v.* George, 80 Ill., 51.
Newman *v.* McComas, 43 Md., 70.
West F. I. Co. *v.* Earle, 33 Mich., 143.
Jones *v.* Jones, 57 Mo., 38.
Chase *v.* Buhl Iron Works, 55 Mich., 139.

The instruction of the Court below was not a fair one as to the facts. Whether or not the place named in the policy was a proper place to store cotton under the circumstances was an immaterial question so far as the liability of the R. R. Co. was concerned.

It was the place selected by the owners of the cotton, and not by the R. R. Co. The cotton was stored there by the owners, and not by the Company. The accumulation of cotton at this improper place, if it was improper, existed in the month of October, before our policy was issued, and in November. Less than 300 bales of the burned cotton were covered by bills of lading of that R. R. Co., issued in October. Seventy-two bales of it were covered by a bill of lading, issued November 10, only four days before the fire. No negligence can therefore be imputed to the railroad company on account of the unfitness of the place where the cotton was stored.

The company had no control over the cotton which was stored there. (Tr., p. 34, fol. 35.) It had no track at the place where the cotton was stored and could not remove the cotton. (Tr., p. 31, fol. 30.) By custom and contract the cotton stored was to remain where it was stored, until the Mo. Pac. R'y Co. removed it to Argenta, and the M. & L. R. R. Co. had no opportunity to obtain the actual custody of cotton, until after it had been compressed at Argenta. (Tr., p. 31, fol. 30.) The delay in its shipment was caused by the fact that the "*Mo. Pac. R'y Co.*," and not the M. & L. R. R'y Co., had not sufficient cars to effect the transportation to Argenta, which they had contracted to effect. (Tr., pp. 33 and 34.) The contracts of the Union Compress Company with the Mo. Pac. R'y Co. for the transportation of such cotton to Argenta and the custom of doing business were known to shippers, when they deposited their cotton with the U. C. Co. and when they took their bills of lading from the M. & L. R. R. Co. (Tr., p. 33, fol. 34, and see also complaint, tr., p. 5, l. 21.) The bills of lading of that Company exempted it from liability for loss occurring on the lines of other carriers (Tr., pp. 26-28). The cotton was burned on the line of the Mo. Pac. R'y Co., not on that of the M. & L. R. R. Co.

None of these matters which were in evidence were alluded to by the Court. We submit that they establish the absence of negligence and liability on the part of the M. & L. R. R. Co. And whether or not they go that far, they were matters the jury had a right to weigh and consider.

The Court virtually instructed the jury that the *M. & L. R. R. Co.* had deposited this cotton in an unsafe place, "it being a dry season, with three or four thousand bales of cotton stored there;" and after

this erroneous and defective instruction as to facts, threatens the jury with the displeasure of the Court and the setting aside of its verdict, if it should bring in a verdict for defendant on that issue.

We respectfully submit that the Court below was in error.

Ches. & O. Canal Co. *v.* Knapp, 9 Pet., 556.
Smith *v.* Conrov, 1 How., 35.
Conn. Mut. L. Ins. Co. *v.* Lathrop, 111 U. S., 614.

IV.

Assignment 7th is as to admission of evidence that an agent of defendant below was informed at the time the policy was issued, that it was intended for the benefit of the R. R. Co's. (Tr., p. 33, fol. 34.)

It is precisely the evidence that was ruled out in Hough *v.* People's F. Ins. Co., 36 Md., 398, *supra*.

An additional reason for keeping it out of this case, was, that the complaint did not allege any such knowledge on the part of defendant, or any intention on the part of defendant to issue its policy for the benefit of the R. R. Co's.

V.

Assignment 3rd is that the Court erred in sustaining the demurrer of plaintiff to 7th paragraph of defendant's answer. That paragraph is as follows: (Tr., p. 18.)

"The defendant says that it is a provision of said policy, that it "shall not apply to or cover cotton, which, at the time of the loss, "was covered in whole, or in part, by marine policies, and it says "that at the time of said loss, 2,172 bales of said cotton, alleged by "plaintiff to have been burned at said fire, and of the value of "$101,973.73, were covered by marine policies theretofore issued "to the respective owners of said cotton."

The policy which is part of the complaint contains the following provision. (Tr., p. 7, line 18.) "It is agreed, and understood to "be a condition of this insurance that this policy shall not apply "to or cover any cotton which may at the time of loss be covered "in whole or in part by a marine policy."

By its policy, the plaintiff in error absolutely declined to insure any cotton which, at time of loss, was covered by marine policies.

As to the absolute validity of this condition, there can be no question.

The right of the insurer to decline insurance absolutely upon certain classes of goods, or under circumstances distasteful to the insurer, cannot be denied. He can provide that goods held in trust are not insured, unless so declared in the policy, and the provision is valid.

Baltimore F. Ins. Co. *v.* Loney, 20 Md., 20.

And if he chose, he might provide that goods held in trust were not and would not be insured at all. He may provide that the policy shall not apply to premises which become unoccupied, or that it

does not so apply unless he receives notice of the cessation of occupancy.

In this case, the plaintiff in error in positive terms declined to insure cotton covered by marine policies. A reason for this provision may easily be found, but it is not necessary to search for one. It is sufficient to say, thus is the contract written. We allege that at the time of loss, nearly all this cotton was covered by marine policies. If that be so no liability attached to this company for loss of cotton so covered.

Nor can this conclusion be avoided by any analogy which may be fancied, or which may exist between a proviso of this kind and a proviso that a policy shall be void in case of additional insurance without notice to and consent of the insurer. Under that class of provisos as usually drawn, it is held that to avoid the policy the additional insurance must be upon the same interest. And in this case the fire insurance taken out by the Compress Company on cotton, "their own, or held by them in trust," and the marine policies taken out by the owners were both upon the same interest, to wit: the interest of the owners.

Home Ins. Co. *v.* Balt. Warehouse Co., 93 U. S., 527.
Fire Ins. Assn. *v.* Mchts'. & Miners' Transportation Co., 66 Md., 346.
Robbins *v.* Fireman's Fund Ins. Co., 16 Blatch., 122.
1 Wood on Ins., p. 671.

But it was claimed that Compress Company's policies were not taken out for the benefit of the owners, but of the railroad companies, and were, therefore, not upon the same interest as the marine policies taken out by the owners.

That claim, however, did not justify the Court in sustaining a demurrer to matter which, beyond any doubt, was a defence, if our theory was correct. We had a right to try the case and formulate our pleadings on *our* theory.

It can not be claimed that our policy *ex vi termini* imported an insurance to the railroad companies.

That position was to be attained only by evidence and a verdict.

For the present, supposing it to be a fact that these fire policies were taken out for the benefit of the R. R. Co., we say there is no analogy whatever between the provision in these policies declining to insure cotton covered by marine insurance, and the ordinary provision in fire policies which we have before mentioned. The latter has been held to be an attempt to guard against double insurance, and it is also held that insurance on different interests is not double insurance, and therefore not within the mischief attempted to be guarded against. But the provision in these policies respecting marine insurance is by no means an attempt to guard against double insurance. On the contrary by the express terms of the policy other insurance without limit of amount or notice thereof is permitted. (Tr., p. 7, l. 28.)

In these policies the fire companies absolutely refuse to insure the property *at all* when it is covered by marine insurance. If the cotton is placed in that situation or under circumstances where its

insurance is absolutely refused it matters not by whose agency the situation was attained or the circumstances developed. We insure the cotton while contained on certain premises. If it is removed from those premises whether by the act of the assured, or without its consent or against its protest, the insurance ceases. No provision of the policy is violated by its removal, because we do not forbid its removal, but we do not insure it if it is removed. So we insure the cotton if and so long as it is not covered by marine insurance. We do not forbid marine insurance any more than we forbid removal of the property, but our insurance ceases as to all property burned while covered by the marine policy.

If in a policy on a building we provide that the insurance shall cease, if the building be occupied for unlawful purposes, and it is so occupied without the knowledge or consent of the assured, the insurance ceases.

Kelly *v.* Worcester M. F. Ins. Co., 97 Mass., 286.

The Court in that case says:

"This habitual use of the building for an unlawful purpose by "the tenant, *even if unknown to the owner*, avoided his policy by the "terms of the first proviso, the manifest object of which is *to define* "*certain risks which the insurers will not assume, without regard to the* "*question, whether they arise or exist by the act or with the knowledge of* "*the assured.*" The proviso referred to is lengthy. By reference to it the Court will see that it is couched in language no stronger if as strong, as that of our policy above quoted.

Keeping of gunpowder in premises without the knowledge of the assured avoids the policy.

Fire Association *v.* Williamson, 26 Pa. St., 198.

And to same effect are:

Mead *v.* Northwestern Ins. Co., 3 Seld., 533.
Howell *v.* Balt. Eg. Society, 16 Md., 377.

The object of the provision against marine insurance in our policy was to define a certain risk which we would not assume.

It is one of the fundamental rules of construction that to every portion of a contract force and effect must be given if it is possible to do so. At the time of insurance the cotton was in Arkansas. It was expected to be used in mills in New England, the British Isles, or wherever else its future purchasers might do business. A carriage by water was contemplated before it should reach its final destinations. The necessity for marine insurance was apparent. The only persons who by any possibility would effect marine insurance were the *owners* of the cotton, either directly or through their agents. It was certain that the railroad company would effect no marine insurance. It had no possible interest on which such insurance could be predicated. Therefore this clause if it means anything means that a marine policy taken out by the *owner* will avoid the insurance. It must have a meaning and it can have no other. It was a warning to all concerned that a marine policy covering the cotton on shore

at Little Rock, would render it a risk which this fire company would not assume.

We submit, therefore, that the cotton, having been covered by marine policies, was not covered by our fire policy, whether the latter was taken out for the benefit of the owners or of the R. R. Co., and that the demurrer was improperly sustained.

VI.

Assignment 10th is the rejection of competent evidence proffered by us that at the time of the fire 2,172 bales of cotton covered by bills of lading of the R. R. Co's and alleged to have been burned, and of the value of $101,973, were covered by marine policies of insurance, theretofore issued to the respective owners of said cotton, etc. (Tr., p. 35, fol. 38.)

By our answer we alleged that at the time of the fire there was a total insurance on the cotton burned to the amount of about $250,000 and claimed the benefit of the contribution clause in our policy. (Answer, tr. p. 19, sect. 9.) The complaint alleged total insurance to amount of $142,500.

Our policy contains the following contribution clause:

"In case of any other insurance upon the property hereby insured, "*whether to the same party or upon the same interest therein or other-*"*wise*, whether valid or not, and whether prior or subsequent to the "date of this policy, the insured shall be entitled to recover from "this company no greater proportion of the loss sustained than the "sum hereby insured bears to the whole amount insured thereon, "whether such other insurance be by specific or by general or "floating policies, or by policies covering only an excess of specified loss. And it is hereby declared and agreed that in case of "the assured holding any other policy in this or any other company on the property insured, or any part thereof, subject to the "conditions of average, this policy shall be subject to average in "like manner." (Tr., p. 10, l. 31.)

It will be seen by the very terms of the policy that it is immaterial on the question of contribution, whether the fire policies were taken out for the benefit of the owners or of the R. R. Companies. In either case the marine policies are contributory.

The clause is very like, but a little stronger, than that sustained by the Court of Appeal of Maryland in Fire Ins. Ass'n *v.* Mchts. & M. Trans, Co., 66 Md., 346. Under it these marine policies were contributory to our fire policy.

The validity of the clause can hardly be called in question.

It is perfectly competent for an insurance company to provide in its policy that any other policy taken out on the insured property shall be considered contributory, even though that policy be invalid, or that its policy shall be absolutely void under like conditions.

Ins. Co. *v.* Verdier, 35 Mich., 395; Cooley, J.
Cassity *v.* N. O. Ins. Ass'n (Miss.), 3 So. Rep., 138.
Cent. Ins. Co. *v.* Hutman, 92 Ill., 145.

We then respectfully submit that we should have been permitted to prove the existence of these contributory policies. That proof being ruled out, we were held to pay the proportion of this loss which 10,000 bears to 142,500, while, if liable at all, we should have been held to pay only in proportion of 10,000 to 244,473.

VII.

Assignment 11th is that the Court erred in striking out testimony of Lawrence Phillips, book-keeper of Ralli Bros. who were claiming pay from the M. & L. R. R. Co. for 158 bales of cotton, to the effect that said cotton was covered by marine policies taken out by Ralli Bros. It was stricken out on the ground that we could prove the insurance only by the policies. It was shown that we could not get the policies.

The ruling was erroneous.

Snow *v.* Carr, 61 Ala., 368-9.

It was especially erroneous in this case, because the M. & L. R. R. Co. was making a claim on us for the value of those 158 bales solely because Ralli & Bros. had made a claim on them. Any evidence which the railroad could have used against Ralli Bros. we were entitled to use against the railroad, and certainly when Ralli Bros. refused to produce the policies, the R. R. Co. could have proved their existence by their clerk. The bills of lading under which that cotton was shipped stipulated that the carriers should have the benefit of all insurance.

VIII.

Our 17th assignment is that the Court erred in refusing to instruct the jury that no cause of action arose on this policy, on behalf of the railroad companies, until actual payment of damages to the owners.

The statement of the facts, in this case, is a strong argument on behalf of that instruction. The Memphis & Little Rock R. R. Co. has not paid a cent, and it is not alleged or proved that it ever will or intends to.

It is contesting the suits brought against it, and may, while we are writing, have defeated them. It was not a party to this action, nor estopped by the pleading therein. If it has defeated the owners in their actions,—and it certainly ought to defeat them, on the evidence in this record—what recourse would we have were this judgment affirmed?

The Mo. Pac. had paid nothing when this action was commenced. No cause of action accrues in a case of this kind until *payment* by the R. R. Cos. of the damages they claim.

Cin. H. &. D. R. Co. *v.* Spratt, 2 Durall (Ky.), 4.

IX.

This argument is already so extended that we will not occupy the time of the Court by discussion of the few other minor points of error assigned.

We respectfully submit that the Court below tried the case on an erroneous theory of the construction and effect of our contract, and under a misconception as to the respective provinces of court and jury.

We further submit that the facts in the record established by the plaintiff below as part of his case, are such as to preclude the possibility of his recovery if a new trial be had, and we ask that this Court adjudge that the judgment of the Court below be reversed and the cause remanded with directions to dismiss the action.

Respectfully submitted,

E. W. McGRAW,
E. W. KIMBALL,
Of Counsel for Plaintiffs in Error.

FILED.
SEP 30 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1051.

THE CALIFORNIA INSURANCE COMPANY,
Plaintiff in Error,

vs.

THE UNION COMPRESS COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR,

(IN INTEREST OF ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.)

JOHN F. DILLON,
Of Counsel.

C. G. Burgoyne's Printing Business, 146 Centre Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE CALIFORNIA INSURANCE COMPANY, Plaintiff in Error, AGAINST THE UNION COMPRESS COMPANY, Defendant in Error.	No. 1051.

BRIEF FOR DEFENDANT IN ERROR (in the interest of St. Louis, Iron Mountain and Southern Railway Company).

Statement.

This is an action upon a policy of insurance against fire, issued by the plaintiff in error in favor of the Union Compress Company upon cotton in its warehouse and adjacent sheds, and the streets between them, at Little Rock, Arkansas.

The action was brought by the Compress Company in the interest of the St. Louis, Iron Mountain and Southern Railway Company and the Little Rock and Memphis Railroad Company, which held the receipts of the Compress Company for the cotton covered by the

insurance, and had issued bills of lading with respect to the same.

The property insured was, in the words of the policy, "cotton in bales, their own or held by them in trust or on commission" (Tr., p. 7).

The record (Tr., pp. 5–23–31) shows the method of transacting business by the Compress Company and the railroad companies, with respect to cotton to have been as follows:

Upon receiving cotton from its owners the Compress Company gave receipts therefor. These receipts were then transferred to the railroad companies, who issued bills of lading for the cotton covered thereby and notified the Compress Company of these facts, at the same time directing it to compress the cotton preparatory to shipment. The railway companies had a continuing agreement with the Compress Company by which, in consideration of a certain sum, the Compress Company agreed to compress and to *insure* all cotton stored in its warehouse, for which the railway companies should issue bills of lading to the owners thereof, upon notice of such issue (Tr., p. 31). Of this agreement the defendant had full knowledge (Tr., p. 33); and under it the railway companies issued bills of lading upon the cotton in controversy and gave due notice of the issue.

After the compression of the cotton and after its delivery to the railroads for transportation, it was the custom for the railway companies to surrender to to the Compress Company the receipts issued by it, and which up to that time had been held by the railway companies.

The cotton in the present case was destroyed by fire

November 14th, 1887, while the policy was in force.

Consignees of the cotton brought suit against the railroad companies—claiming that the loss occurred through the negligence of their employees, and obtained judgments in several test cases, whereupon the St. Louis, Iron Mountain and Southern Railway Company (Missouri Pacific System) paid to the owners the larger part of the loss of cotton upon which it had issued bills of lading, and adjusted the balance for payment (Tr., p. 34).

The present action was brought, as has been stated, for the protection of the interest of the railway companies, and for their indemnification.

The jury rendered a verdict in favor of the plaintiff for $9,431.96.

ARGUMENT.

I.

A bailee may insure in his own name merchandise "held in trust or on commission," and recover for the entire value of the goods, holding the excess over his own interest for the benefit of those by whom the goods have been entrusted to him.

De Forest vs. Fulton Fire Ins. Co., 1 Hall, 84.

Home Ins. Co. vs. Baltimore W. H. Co., 93 U. S., 527, 543.

Stillwell vs. Staples, 19 N. Y., 401.

Waring vs. Indemnity F. Ins. Co., 45 N. Y., 606.

Waters vs. Monarch Fire, etc. Co., 5 Ell. & Bl., 870.
Siter vs. Morrs, 13 Pa. St., 218.
Johnson vs. Campbell, 120 Mass., 449.
Fire Ins. Asso. vs. Merchants & M. Trans. Co., 66 Md., 339.

The plaintiff in error concedes the foregoing proposition when applied to cases where the person entrusting property to the bailee is the *owner* of the property so entrusted, but he controverts it when applied to cases where the person so entrusting the property has any interest other than that of absolute ownership. He proposes that the term "held in trust" shall be read with the addition of the words "for the owner," and in support of this proposition he cites a number of cases where it happened that the owner was the bailor and the person for whom the goods were "held in trust." By a singular process of generalization from the particular *facts* of these cases he deduces, as a rule of law, or construction, the proposition that the term "held in trust" occurring in a policy of insurance must be held to have no office or effect in defining the interest protected, unless that interest is absolute ownership. He suggests this arbitrary restriction of the term "held in trust" while at the same time he does not dispute the insurable interest of the railway companies, nor deny that the Compress Company was answerable only to the railway companies for the property insured, *i. e.*, that it held the property in trust exclusively for the railway companies.

The principle stated in the cases to which plaintiff in error refers must, of necessity, apply in favor of any bailor having an insurable interest. The right of

bailors to claim the benefit of insurance effected by their bailees, in the form stated, grows out of the fact that they have *entrusted* goods in which they have an insurable interest to the care of the bailees. While it happens that in the cases, cited by plaintiff in error, the bailor has been the owner of the goods insured by the bailee, and it has not, therefore, been necessary for the Courts to discuss the right of those depositing goods in a capacity other than that of ownership, it is perfectly clear that the reasoning of these decisions applies with equal force to any person who, having an insurable interest in property, entrusts the property for safe keeping, or for any other purpose to another; and that any bailor may, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee.

Neither the language of the Courts nor common sense will admit of any other doctrine.

In Home Ins. Co. vs. Balt. Warehouse Co., 93 U. S., 527, 543, the Court said:

"The words 'merchandise held in trust' aptly describe the property of the depositors. The Warehouse Company held merchandise in trust *for their customers*, not, it is true, as technical trustees, but as trustees in the sense that the goods had been entrusted to them."

In Waters vs. Monarch Fire, &c., Co., 5 Ell. & Bl., 870, Lord CAMPBELL said:

"What is meant in those policies by the words 'goods in trust?' I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense, so held that there was an equitable obligation on the assured enforceable by a subpœna in Chancery; but goods with which they were entrusted in the ordinary sense of the word." * * * "It would be most inconvenient in business

if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all who might become customers."

And COMPTON, J., said :

"The parties meant to insure those goods with which the plaintiffs were entrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to their *bailors*."

The same Court in a later case (London & N. W. Ry. Co. vs. Glyn, 1 Ell. & Ell., 652), said of the case last cited :

"That case established that persons who are the bailees of goods have an insurable interest in them as against the ensurers, to their full value, although the assured may be trustees for *third persons* for part of the amount recovered in the policy."

The original depositors of the cotton surrendered their receipts to the railway companies and the railway companies were thus substituted to the relation to the Compress Company which had been held by these depositors. The beneficiaries of *the trust*, so far as the Compress Company was concerned, were obviously the persons to whom it owed the duty of bailment—the persons entitled to demand from it the possession of the property, viz., the Railway Companies. The Compress Company had no privity with any other person than with him who held its receipt. It owed no other person any duty, and was answerable to no other person for any liability. In short, it held the property "*in trust*" for no other person, and knew no other person in its character of bailee of the property entrusted to it. That the holders of the Compress Company's receipts—the persons entitled as against the Compress Company to delivery of the cotton—were the only persons

for whom it held the cotton in trust must be sufficiently obvious. The claim of the insurance company is that it did not have in mind any other persons than the owners for whom the cotton was to be held in trust. Independently of the actual notice to the insurance company that the policies were taken out for the benefit of the Railway Companies (a fact referred to hereafter), it is enough to say that by its language the policy covered property "held in trust" (without condition or restriction as to the character of the person for whom the trust or bailment should exist) and protected the interest of the person for whom the property was so held. If that interest was an *insurable interest* there is an end to the controversy on this point. There is no pretense that the interest of the railway companies was not an insurable interest. Upon this point the fact may be summarized in the statement that the policy covered property held in trust; the Compress Company held the cotton in trust for the Railway Companies, and the Railway Companies had an insurable interest in the property.

To hold that only an *owner* who intrusts goods to the care of another may receive the benefit of insurance effected by the bailee would prevent the insurance of any other interest in goods held in warehouses and Compress Companies, except in the name of the party having such other interest, and would prove to be a very serious obstacle to the forwarding of freight and to the transaction of business generally.

The brief for plaintiff in error carries a suggestion that in the case at bar the Compress Company has no such responsibility to its bailors, the railroad companies, as justified the insurance in their favor, because

of the clause in its receipts providing that it was "not responsible for any loss by fire" (Tr., p. 23). But such responsibility of the bailee is wholly immaterial. His relation to the property intrusted to him, and his duty to the bailor, determines the legal propriety of such insurance for the benefit of the latter.

In De Forest vs. Fulton Fire Ins. Co., 1 Hall, 84, 135, the policy was on goods "as well the property of the assured as held by them in trust or on commission."

OAKEY, J.: "In marine policies, effected in the name of a particular person, where it is intended to cover the interest of other parties, it is usual to insert a clause 'for whom it may concern.' And it seems well established that a policy containing such a clause *or other equivalent ones*, will protect the interest of any person in the property insured, in whose behalf the assured has a right to act as agent. Now, whatever doubt may be raised as to the extent of the insurable interest of a factor, it cannot be questioned that as agent of *his principal* he may effect insurance for his benefit. The words 'held on commission' in these policies are equivalent to the clause 'for whom it may concern,' usually inserted in marine policies. They contain a distinct declaration to the insurers that the assured were acting for the benefit of their consignors, and that other interests than their own were to be protected by the policies."

In Siter vs. Morrs, 13 Pa. St., 218, it was said:

"Policies in which the insurance is expressly declared to be not merely of the property of the assured, but of property held by him in trust and on consignment or commission, and the like, are of every day's occurrence. They are adapted to the varied wants of a large mercantile community, and the construction which gives to all the property fairly within the language used *equal protection*, does but carry out the true meaning and actual purpose of the party in whose name the instrument was obtained.

In Phœnix Ins. Co. vs. Hamilton, 14 Wall., 504, 508, where the question was whether insurance can be effected in the name of a nominal partnership when the business is carried on by and for the use of one of the partners, the policy read: "Grain in store, their own or *held by them in trust* or on commission."

BRADLEY, J., delivering the opinion of the Court, said:

"And as it is well settled that a trustee or agent may insure property in that capacity *for the benefit of all concerned*, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as to transact the other business in the partnership name."

In Fire Ins. Asso. vs. Merchants' and Miners' Trans. Co., 66 Md., 339, 346 (1886), the policy was issued to Merchants' and Miners' Transportation Company (carriers) "for account of whom it may concern against loss or damage by fire to the amount of $5,000 on merchandise, being chiefly cotton in bales, its own, or in its care or custody as carriers." The cotton was burned and suit brought on the policy for benefit of the owners. The Court said:

"It is now well settled that when a person has the custody, care or possession of property for another, and bears the relation to it of consignee, carrier, factor, warehouseman or bailee, he may, though he has no pecuniary interest therein and *is not responsible for its safe keeping*, insure it in his own name for the benefit of the owners, and the insurance will inure to their benefit upon a subsequent adoption of the insurance even after the happening of the loss under the policy." *Held*, also, that the adoption can be inferred from acts subsequent to the loss.

The transaction in the present case had no unusual elements. The arrangement was that the Railway Com-

panies should pay to the Compress Company, in connection with the charge for compression, an additional sum which would provide for the insurance of all cotton in the possession of the Compress Company for which the Railway Companies issued bills of lading. The Insurance Company had notice, as appears hereafter, that the insurance was effected in the interest of the Railway Companies, and it issued its FLOATING POLICY to include the protection of the Railway Companies. It is wholly immaterial whether the interest of other persons in respect to cotton held for them by the Compress Company was protected by the same policy. The policy, whoever else it might protect, protected the Railway Companies in respect to any cotton which might be held for them by the Compress Company during the life of the policy. It is manifestly immaterial whether the cotton was originally deposited by the Railway Companies or whether their interest accrued through the transfer of the receipts subsequently to a deposit made by other parties. The only question is, what cotton was "held in trust" for the railways,—for what cotton was the Compress Company accountable to the Railway Companies, at the time of the fire? As respects such cotton the insurance protected the interest of the Railway Companies. They paid for the maintenance of a floating policy to include such protection, and the Insurance Company was notified of this design, and made its contract to cover this purpose.

The Railway Companies would have been entitled to the insurance, under the form of the policy, even if the Compress Company had insured the cotton to its full

value without any express agreement with them and even without their knowledge.

Waters vs. Assurance Co., 5 Ell. & Bl., 870.
Waring vs. Indemnity Ins. Co., 45 N. Y., 606.
Stillwell vs. Staples, 19 N. Y., 401.
Woods on Fire Ins., 2d Ed., Sec. 294 *et seq.* and cases.

The policy need not state the nature of the interest.

Phœnix Insurance Co. vs. Erie Trans. Co., 117 U. S., 323.

II.

The plaintiff in error is estopped from claiming that the policy sued upon covered only the interest of the owners of the cotton, and not that of the railroad companies.

At p. 33 of the Transcript (Bill of Exceptions) it appears that the plaintiff

"Offered evidence tending to prove that the contracts and customs of business before stated was well known to shippers and to the defendant when the policy sued on was issued, it having been stated to the agent of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the Railway Companies."

It is well settled that evidence is admissible to show what interests were intended to be covered by such policies as that in the present case.

In the case of Home Ins. Co. vs. Baltimore Warehouse Co., this Court, Mr. Justice STRONG delivering the opinion, said:

"It is no exception to the rule" (governing the admission of parol evidence) "that, when a policy is taken out expressly 'for or on account of the owner' of the subject insured, or 'on account of whomsoever it may concern,' evidence beyond the policy is received to show who are the owners or who were intended to be insured thereby. In such cases the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all." The policy before the Court in this case covered merchandise "their own or *held by them in trust*, or in which they have an interest or liability."

See also, Finney vs. Bedford Ins. Co., 8 Met., 348 (cited by this Court in above case).

Fire Ins. Co. vs. M. & M. Trans. Co., 66 Md., 339.

Snow vs. Carr, 6 Ala., 363.

Having issued the policy with the notice that it was intended to cover the interest of the railroad companies, the plaintiff in error cannot now be permitted to assert that it was only intended that the legal owners of the cotton should be protected.

III.

The clause in the policy relating to marine insurance does not exempt the Insurance Company from liability.

The policy contained the following provision:

"It is agreed and understood to be a condition of

this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or in part by a marine policy."

The answer of the plaintiff in error—defendant below—(Tr., p. 18, Par. 7) alleged the substance of the foregoing provision and averred that at the time of the loss 2,172 bales of said cotton of the value of $101,973.73 was covered by marine policies theretofore issued *to the respective owners of said cotton.* The defendant demurred to this clause of the answer (Tr., p. 19) upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained (Tr., p. 32) and this ruling of the Court is one of the errors assigned (Tr., p. 18).

Upon the trial the Insurance Company offered evidence tending to prove that part of the cotton was at the time of the fire covered by marine policies theretofore issued to the respective owners of said cotton. The evidence was objected to upon the ground that it was immaterial and irrelevant, and that the insured knew nothing of said policies and had no interest in them. The objection was sustained by the Court, and the ruling upon this point is also assigned as error (Tr., p. 35).

In the answer it was sought to allege, and in the offer of proof it was sought to show, that additional insurance had been effected *by a person other than the assured, covering an interest other than that protected by the policy issued by the plaintiff in error.* The demurrer was, therefore, properly sustained, and the evidence offered properly excluded.

There was no claim that either the insurer or the insured had any previous knowledge of the existence of such policies, nor was any proof offered of the time when

the same were issued, whether before or after the date of the fire policies sued on.

The record does not affirmatively show the office or function of this provision against marine insurance. Counsel for plaintiff in error does not define or even suggest the evil at which it is aimed, nor does he intimate that any marine insurance which may have been effected by the consignee, in this case, presents the evil intended to be guarded against, or has in any way affected the interests or the position of the Insurance Company. In his brief he contents himself with this observation: "A reason for this provision may easily be found but it is not necessary to search for one. It is sufficient to say thus is the contract written."

The Insurance Company can in no way be affected by the alleged fact that the cotton or any part of it was covered by marine policies, unless it claims that the issuing of such policies amounts to double insurance. In any other view it has no interest in marine insurance, which primarily covers property only while it is in transit. If then such insurance is claimed to be double insurance the question as to the effect of the clause is immediately settled by the well established rule that *only risks upon the same interest in property and in favor of the same person* constitute double insurance.

North British and M. Ins. Co. vs. London, Liverpool & Globe Ins. Co., L. R., 5 Ch. Div., 569.

S. C., 22 Eng. Rep. (Moak's Notes), 323.

Royster vs. Roanoke N. & B. S. B. Co., 26 Fed. Rep., 492.

Lowell Mfg. Co. vs. Safeguard F. Ins. Co., Co., 88 N. Y., 591.

Phillips on Ins., Sec. 359.

Wood on Fire Ins., 784 *et seq.*, and cases cited.

But it is claimed that the clause in question is not aimed at double insurance, in the ordinary sense of that term, but that it is aimed at a peculiar species of insurance. This distinction, however, suggests no reason for any diversity in the construction of provisions avoiding policies in case of further fire insurance, and provisions avoiding policies in case of marine insurance, —the provisions in both cases being identical except as to the class of insurance prohibited. Either class of insurance is *additional insurance*, and the language prohibiting the additional insurance is the same in both cases except in the designation of the class. If the Courts construe a provision avoiding a policy in case the property is additionally insured against fire, as relating only to additional insurance upon the same interest and effected by the same person or in his interest, it is difficult to conceive a reason for applying a different rule of construction to a provision avoiding the policy in case of further insurance against the perils of the sea. No reason for any such diversity of construction is attempted by counsel for plaintiff in error, and none is possible. It is, however, seriously argued in behalf of plaintiff in error that the taking out of a marine policy by the owner of the cotton, without the knowledge or participation of the Compress Company or the railway companies, would avoid the policies taken to protect the independent interests of the latter; and that this is so whether the marine insurance was effected before or after the insurance in favor of the railway companies.

The plaintiff in error endeavors to distinguish the condition in respect to marine insurance from the ordinary condition in respect to further fire insurance, by

treating the former class of insurance as impressing some new element or status upon the property itself, while he concedes that the latter class—so far as the interpretation of the condition under discussion is concerned—is treated as relating to the interest protected. The distinction is clearly unsubstantial and without the suggestion of basis. Obviously, one class of insurance no more affects the *property*, or gives character to the risk, than the other.

Cases are cited in the brief of opposing counsel in which it is held that conditions avoiding a policy in case of the use of the premises for an unlawful business, or for storage of gunpowder, &c., will be sustained although the unlawful business was carried on, or the gunpowder stored without knowledge or consent of the owner. Clearly so; the possession of the tenant or occupant is the possession of the owner; the tenant or occupant is the representative of the owner and holds subject to such control as the owner may have asserted, and subject to such conditions as he may have imposed. Such contracts made by the owner, as to the use of the premises insured, are in the nature of warranties and cover matters within the legitimate dominion and control of the owner. But it is extravagant to claim that a condition such as that here under discussion was intended by the assured to subject his policy to forfeiture if, perchance, any stranger, having some remote and independent insurable interest, should take out a policy of marine insurance to protect that interest. It is certainly true that a party will ordinarily be supposed to contract with reference to his own actions or the actions of those representing him or under his control. Mere

general words of contract will not be construed as creating an undertaking in respect to the actions of third parties not named and with whom the party contracting has no relation or privity. It is preposterous to argue that it was the intention of the assured to contract with respect to the transactions of absolute strangers, to whom it had no relation, and whose acts, and contracts could not have been anticipated, or controlled, or even known by it.

" Words should not be taken in their broadest import when they are equally appropriate in a sense limited to the object the parties had in view."
1 Wood on Fire Insurance, 146.

" All words," said Lord BACON, " whether they be in deeds or in statutes or otherwise, if they be general and not express and precise, shall be restrained into the fitness of the matter and the person."
Bacon's Law Maxims, Reg. 10.

When it is claimed that the clause in question operates to avoid the policy in case any other person than the assured (without his knowledge) takes out marine insurance covering an entirely different and independent interest; when such a rule is propounded without even the suggestion of a reason founded in the right or interest of the Insurance Company, then it is sought, by construction, to make the clause a trap to the insured and a means of escape to the insurer. Courts will not incline to a construction which has this result.

" We are not to suppose that conditions involving forfeitures are introduced into policies by insurance companies, which are purely arbitrary and without reason, merely as a trap to the assured or as a means of escape for the company in case of loss. When, therefore, a general condition has no application to a particular policy; where the reason which alone gives

it force is out of the case, the condition itself drops out with it."

Paxson, J., in Grandin vs. Rochester Ger. Ins. Co., 107 Pa. St., 26, 37.

If the extraordinary construction for which counsel for plaintiff in error contends were inevitable, then we submit, the Courts would unhesitatingly treat the condition as unreasonable and unjust and hence void. But the construction of the provision against marine insurance, which is now attempted to the end that plaintiff in error may escape its liability, is as entirely without authority in adjudged cases as without basis in fairness and reason.

It is a construction which is opposed to the uniform rule adopted in cases involving conditions of the same substantial character (Cases, *supra*, page 14), and opposed to the fundamental rule governing the interpretation of conditions generally which provide for forfeiture of insurance policies.

In the case of Mulville, trustee, against Adams and others, 19 Fed. Rep., 887, Judge WALLACE says that

"it is a familiar rule in the interpretation of conditions which work a forfeiture that they are not to be extended by construction, and, being inserted for the benefit of the insurer, they are to be liberally construed in favor of the assured."

In the case of Hoffman vs. Ætna Insurance Company, 32 N. Y., 414, the Court states the rule in the following language:

"The appellants also encounter another rule equally at variance with the proposition they seek to maintain, 'Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced' (Livingston vs. Sickles, 7 Hill, 255; Catlin vs.

Springfield Ins. Co., 1 Sumn., 434; Breastead vs. Farmers' Loan and Trust Co., 4 Seld., 305). This rule, applicable to all contracts, has peculiar force in cases like the present, where the attempt is to seize upon words introduced as a safeguard against fraud, and make them available to defeat the claim of the assured on the theory of a technical forfeiture without fault. If the policy admits of such a construction, it is due to the dexterity of the draughtsman and not to a meeting of the minds of the parties."

This language presents an apt commentary upon the construction attempted in the interest of the plaintiff in error.

The sixth point in brief for plaintiff in error (p. 42) is an additional argument that there was error in the ruling of the Court sustaining the objection of the plaintiff to the offer of evidence, upon the part of the defendant, as to the existence of marine insurance. The offer (Tr., p. 35) was of evidence "tending to prove that at the time of said fire 2,172 bales of the cotton covered by the bills of lading aforesaid, and alleged to have been burned at the fire in question, and of the value of one hundred and one thousand nine hundred and seventy-three dollars and seventy-three cents were, at the time of said fire, *covered by marine policies of insurance theretofore issued to the respective owners of said cotton residing in various portions of the United States and in England.*" This evidence was objected to on the ground that it was "immaterial and irrelevant, and on the ground that the insurer knew nothing of said policies and had no interest in them." The offer was clearly *an offer to prove the bare fact of marine insurance in support of the defense in paragraph 7 of the answer.* It did not include a production of the poli-

cies or a *disclosure of their amounts*, or of any of their terms or conditions. It was an offer to prove the *fact* of marine insurance upon the theory that the policy would be avoided thereby; but it is now claimed by opposing counsel (Brief, p. 42) that the offer was also in support of the defense (stated in the *ninth* paragraph of the answer) that "there was a total insurance on the cotton burned to the amount of about two hundred and fifty thousand dollars ($250,000), and by the terms of this policy the defendant was liable only for such portion of the whole loss as the amount of its policy bears to the sum of all the insurance existing at the time of the loss."

The idea that the offer of this evidence had any bearing upon the amount of proportionate liability is clearly an afterthought. Not the least reference to such bearing is to be found in the offer itself or elsewhere in the record with regard to it. No suggestion was made of instructions to the jury on this head. The record fails to disclose that had the testimony offered been admitted it would have furnished any data which could aid in computing the proportionate liability of defendant. It was an offer to prove merely the *fact* of marine insurance, and not an offer to prove the *amount* of such insurance. Exclusion of such proof when offered only in bar of liability cannot be held to excuse a suggestion of the same proof as applicable to a reduction of the verdict. The questions are distinct, and the Court was entitled to a suggestion, and, if need be, a discussion of them both. The value of this position is not lessened by the fact that the proof itself was no less inadmissible on this ground than on the other.

The error assigned by counsel is that the Court excluded evidence of the *existence* of marine policies covering cotton alleged to have been of a certain value. The offer did not include any statement of the amount of the policies, and hence if the evidence has been admitted, no fact would have been proved upon the basis of which the jury could have found the proportion in which the liability of the plaintiff in error should be reduced by a consideration of the amount of the marine policies. It does not require argument to show that proof of *the mere fact* of this additional insurance, *without any proof of the amount* of the insurance, would not be proof of any fact upon which the Court could direct, or the jury could compute, any proportionate reduction of liability, as claimed in the ninth defense of the answer. Nor can it be claimed that the offer of this proof was the offer of any link in the chain of proof covering the amount and general terms of the marine policies. The bill of exceptions states the ruling of the Court, upon the offer of this evidence, as distinct and independent error. The ninth paragraph of the answer is an affirmative defense. It is a partial defense in that it is an attempt to reduce recovery by securing a *pro rating* of the loss with other insurance companies. Evidence upon this point would only be complete when including a statement of the amount of the policies to be considered. The offer to prove under the defense must be as broad as the statement of the defense in the pleading. If, therefore, the offer only covers a part of the evidence, *i. e.*, the mere fact of marine insurance, and not the amount, it becomes wholly immaterial testimony and does not substantiate the grounds of defense relied upon. It is incumbent upon the party

alleging error to affirmatively show upon the record not only that there was error in the exclusion of evidence, but that such exclusion was prejudicial to the party offering the testimony.

Even if the offer under discussion be regarded as a partial offer to prove the marine policies—their amount to be proved in different form at a subsequent stage of the proceedings (a theory not suggested in the bill of exceptions),—the ruling would still stand, inasmuch as the plaintiff in error was unable to offer any competent evidence of the amount or terms of the marine policies (Tr., p. 37); and if proof of the fact of marine insurance had been admitted, it would have been subsequently stricken out; the fact of marine insurance, effected by the owners, being immaterial as affecting the validity of insurance for the benefit of the Railway Companies, and (in the absence of proof of the amount) being immaterial and insufficient upon the claim of a reduction of the liability of the Insurance Company.

The correctness of the views above expressed is demonstrated by the fact that the only specific offer to prove the terms of marine policies, including the extent of the insurance, was made in the form of an offer of the deposition of Lawrence Phillips, and the testimony of Wm. Bowen (Tr., pp. 36, 37), both of which were excluded upon grounds, the soundness of which need scarcely be urged.

All competent testimony as to the amount of additional insurance was received and the Insurance Company's liability diminished by the verdict of the jury in the proportion which the loss bore to the total insurance. Aggregate insurance of $142,500 was shown (Tr., p. 42).

IV.

The fact that the loss was incurred through the negligence of the employees of the railway companies in no way affects their interest under the policy.

The right of a common carrier to recover insurance for losses caused by the negligence of its employees is so well settled that counsel for the plaintiff in error, in urging the application of a different rule, are compelled to invite this Court to review its carefully considered judgment in the case of Phœnix Insurance Company against Erie Transportation Company, 117 U. S., 312–324.

In that case Mr. Justice GRAY, delivering the opinion of the Court, said:

"No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants."

The judgment in that case has been referred to with approval in the subsequent cases of Orient Insurance Company vs. Adams, 123 U. S., 67–72, and in Liverpool Steam Co. vs. Phœnix Insurance Company, 129 U. S., 397–438, and the decision was preceded by an unbroken line of English and American decisions, cited by the Court, which declared the same rule.

We do not feel called upon to argue a proposition upon which this Court has recorded its deliberate judgment.

CONCLUSION.

It remains to notice several propositions which we find in the brief of counsel for plaintiff in error and to which we think it unnecessary to devote argument under specific propositions.

1. POSSESSION OF THE COTTON. It is suggested in the brief of opposing counsel that the possession of the cotton was transferred to the railway companies by the issue of bills of lading (Brief, p. 33), and that the Insurance Company became exempted from liability because of the provision avoiding the policy in case of any change in the possession of the cotton without a consent endorsed by the Insurance Company upon the policy.

There is no pretense that the cotton was not still in the hands of the Compress Company, upon its premises, and in its actual and physical possession. We do not quite understand the argument of counsel, unless it be that he conceives that by acquiring the receipts of the Compress Company and issuing bills of lading the railway companies assumed constructive possession of the cotton; but if the "issuing of a bill of lading by a transportation company of goods in the warehouse of another company places the goods in the care and custody of the transportation company for the purposes of insurance,"—a proposition supported by authorities in plaintiff's brief at page 34, and which we not only concede but strenuously urge—it certainly cannot be claimed that the warehouse company (or, in this case, the Compress Company), although retaining actual and physical possession of the merchandise, has so lost some element of possession as to be deprived of the right to

effect insurance for its own benefit, and (as bailee or agent) for the protection of the Railway Companies (Cases cited, *ante*, pp. 3–6, 8, 9). It is clear that counsel has confused the actual possession (still remaining with the Compress Companies) with the *right* to ultimate possesion which passed with the receipts from the original depositors to the railway companies.

2. "DIRECT LOSS OR DAMAGE BY FIRE." We find in the brief for the Insurance Company an elaborate argument to the effect that no recovery can be had in the interest of the R. R. Companies because the injury to them depended upon their liability for the negligence of their employees in causing the fire. It is stated that the policy in suit is against all *direct* loss or damage by fire, and it is argued that "a *direct* loss or damage is a loss which immediately happens by reason of the bare fact that the goods were burned." In other words, that the "*loss or damage*" does not refer to the effect of the fire upon the *property*, but that it means loss or damage as respects the pocketbook of the insured; and that the word "direct" qualifies the term "loss or damage" as so construed. We will scarcely ask the Court to consider any extended reply to this argument. The term "*direct* loss or damage by fire" manifestly means loss or damage occurring *directly from fire as the destroying agency*. The books are so full of cases which discuss the liability of insurance companies under varying circumstances involving the directness or remoteness of fire as the agency of destruction, that there can be no question of the meaning of the word "direct," or of the intention in its use. The question whether fire is the proximate agency in

the loss or damage has been considered in cases of explosions of gunpowder, gases, chemicals, &c., caused by fire; in cases of explosions of steam boilers; in cases where buildings have been destroyed to prevent the spread of conflagration, or of destruction through the falling of burning walls, &c., &c. In 1 Wood on Fire Insurance (p. 238 *et seq.*), nearly 50 pages are devoted to a discussion of this subject and of the adjudications upon the conditions of policies of insurance relating to the proximate cause of loss or damage to the insured property.

3. CHARGE OF THE COURT. The 21st assignment of error relates to the charge of the Court as to the alleged negligence of the Memphis and Little Rock Railroad Company. The charge is discussed in the brief of plaintiff in error at pages 37–38. The portion of the charge of the Court objected to is stated to be this:

"If you can say that that was a proper place to store cotton, and that leaving a passageway there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat house and skiff-ferry, and it being a dry season, with three or four thousand bales of cotton stored there, then if you say this is not negligence, you excuse this Railroad Company and to that extent will disallow the claim of plaintiff; but if you should so find, I will be very much surprised at your verdict, and would not be surprised if I should set it aside, but I leave it for you to say" (Tr., pp. 43–44).

The mere fact that the Court dwelt with some emphasis upon facts which seemed to it of controlling importance and expressed its opinion as to the bearing of these facts upon the question of negligence, is wholly immaterial if the issue itself is left to the jury. The

charge of the Court in a clause immediately preceding the clause objected to was as follows: "It is for you to determine whether this Railroad Company was not guilty of negligence and was not at fault in leaving this cotton in an exposed condition after it issued bills of lading therefor" (Tr., p. 43). And in the last clause of that part of the charge objected to by the plaintiff in error the Court expressly states that it leaves the question of negligence to the jury. A conclusive answer to the claim of error on this point is found in the language of this Court in the case of Vicksburg, &c., R. R. Co. vs. Putnam, 118 U. S., 545–553, where Mr. Justice GRAY, on behalf of the Court, said:

"In the Courts of the United States, as in those of England, from which our practice was derived, the Judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

See also Indianapolis, &c., R. R. Co. vs. Horst, 93 U. S., 291.
Nudd vs. Burrows, 91 U. S., 426.
St. Louis, I. M. & S. Ry. Co. vs. Vickers, 122 U. S., 360.

4. THE RIGHT OF ACTION HAS ACCRUED. The right of the Compress Company to recover in this action is not affected by the circumstance that the Railroad Companies had not, at the time of the trial, fully discharged their liability for tne cotton detroyed.

It has already been shown that the assured, under the policy taken out by a bailee to cover property, "his

own or held in trust or on commission," may enforce the contract of insurance to the *full value* of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailors.

See cases cited under First Point.

The case cited by counsel for appellant (Cin., H. & D. R. R. Co. against Spratt, 2 Duvall (Ky.), 4) is not in point. That case was brought by a consignee against a carrier, and the ruling was that the consignee of freight, under a bill of lading, entitling the carrier to insurance obtained by the consignee, could not be compelled to proceed upon the policy before enforcing his claim upon the carrier, even where it appeared that the insurer had agreed to pay its loss under the policy and though it was alleged that the suit was prosecuted for the benefit of the underwriter.

The present case presents no facts to which this decision could be applied. Here the Compress Company, the plaintiff (below), is the assured—the insurance being taken to include the protection of the Railway Companies. The premium was paid; and the condition of liability of the Insurance Company—the destruction by fire of the insured property—is complete. The liability of the Insurance Company has fully accrued. The limit of admissible defense on its part was that the Railway Companies had no liability protected by the insurance. This issue has been litigated in this case between the parties to the contract of insurance, and has been conclusively found against the plaintiff in error.

The Insurance Company is not called upon to perform more than its agreement to pay insurance in case

of destruction by fire. It cannot evade the performance of that agreement on the ground that the liability protected by the insurance has not been fully discharged, nor can it postpone payment until that liability is liquidated.

The right of action and recovery is not contingent upon payment by the Railway Companies of the value of the cotton destroyed, but it is, at most, contingent upon the destruction of the cotton by fire under circumstances imposing liability on the Railway Companies.

JOHN F. DILLON,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. .....

THE CALIFORNIA INSURANCE COMPANY,

Plaintiff in Error,

v.

THE UNION COMPRESS COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANT IN ERROR.

U. M. & G. B. ROSE.

PRESS PRINTING CO., LITTLE ROCK, ARK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. .....

THE CALIFORNIA INSURANCE COMPANY,

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v.

THE UNION COMPRESS COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANT IN ERROR.

On the 14th day of November, 1887, cotton to the value of $133,500 was burned in and near the warehouse and sheds of the Union Compress Company, in the City of Little Rock, it being covered at the time by policies of insurance for $142,500. This cotton had been left with the Compress Company for the purpose of compression, preparatory to shipping, by the St. Louis, Iron Mountain and Southern Railway Company, and the Memphis and Little Rock Railway Company, which had issued bills of lading therefor; the railway companies, through an arrangement with the Compress Company, having had the cotton insured, paying the premiums therefor and the charge for compression.

The Compress Company sued plaintiff in error on a policy for $10,000, for its part of the loss. The complaint (Tr. 4), sets out in detail the circumstances attending the loss. There was an answer, a trial by jury, and a judgment for plaintiff for $9,491.96 (Tr. 20), and defendant brought error.

The policy contains this clause:

"In consideration of the stipulation herein named, and of "seventy dollars premium to be paid by the insured herein- "after named [the California Insurance Company, of San "Francisco], does insure the Union Compress Company for "the term of thirty days, from the second day of November, "1887, at noon, to the second day of D. cember, 1887, at noon, "against all direct loss or damage by fire, except as herein- "after provided, to an amount not exceeding ten thousand "dollars, to the following described property, while located and "contained as described herein, and not elsewhere, to-wit.:

"FORM OF COTTON POLICY.

"Ten thousand dollars on cotton in bales, their own or held "by them in trust, or on commission, while contained in the "frame shed 112 to 122 inclusive, North Main street, and on "platforms adjoining, and in street, immediately between the "sheds, Sanborn's map of Little Rock, Ark.; and it is agreed "and understood to be a condition of this insurance, that this "policy shall not apply to or cover any cotton which may, at "the time of loss, be covered in whole or in part by a marine "policy." (7)

Also this clause:

"This entire policy, unless otherwise provided by agreement "indorsed hereon, or added hereto, shall be void if *the insured*

" now has or shall hereafter make or procure any other con-
" tract of insurance, whether valid or not, on property covered
" in whole or in part by this policy; * * * *
" or if the interest of the insured be other than the uncon-
" ditional and sole ownership." (8)

The printed part of the policy goes on as usual in fire policies, to make stipulations with regard to real estate, notes, jewelry, books, engravings, fresco work, and many other kinds of property not embraced in the insurance. The clause as to change of title clearly relates to other risks, as cotton in the temporary custody of a bailee for compression, for which receipts or bills of lading have been given, is continually changing hands. Hence the language of the written part of the contract is general, on cotton " their own, or held by them " in trust, or on commission."

Grandin v. Rochester Ins. Co, 107 Penn. St., 26.
Wolf v. Ins. Co., 39 N. Y., 49.

It is not disputed that the insurance was taken out by the railway companies; it is not denied that they paid the premiums; and it was proved that these facts were well known to the agents of the defendant at the time that the policy was issued.

In order to make out a case of double insurance, counsel for plaintiff in error say that the policy was for the benefit of the *owners* of the cotton; and that the *owners* took out marine policies. The policies, it is said, could not avail for the protection of the railway companies, as they were not the *owners* of it.

This is what is known in the law as a quibble; and a very transparent one at that. It is conceded that the railway com-

panies had an insurable interest. Then to that extent they were owners. "The word 'owner' has no technical meaning, "being *nomen generalissimum.*"

1 Hare's Am. Const. Law, p. 355.

The evidence as to the ownership of the cotton was clearly admissible; as was held in *Home Insurance Co. v. Baltimore Warehouse Co., 95 U. S., 543.*

The policy embraced all cotton left with the Compress Company by the two railway companies.

Johnson v. Campbell, 120 Mass., 453.

Stillwell v. Staples, 19 N. Y., 403.

Hanshaw v. Mutual Ins. Co., 2 Blatchf., 99.

Buck v. Chesapeake Ins. Co., 1 Pet., 151.

Hodgson v. Marine Ins. Co., 5 Cranch, 100.

Phœnix Ins. Co. v. Hamilton, 14 Wall., 506.

Hooper v. Robinson, 98 U. S., 536.

Ins. Co. v. Chase, 5 Wall., 512.

1 Phil. Ins., secs. 384–5.

Waters v. Monarch Ins. Co., 5 El. and Bl., 870.

We do not see the relevancy of citations made by counsel to their contention.

In *Snow v. Carr, 61 Ala., 363*, it was held that parol evidence was admissible to show what goods were intended to be insured under general words used in a policy.

In *Fire Insurance Co. v. Merchants' Transp. Co., 66 Md., 346*, it was held that parol evidence to show the parties for whose benefit the insurance was taken was admissible.

In *Lucas v. Ins. Co., 23 W. Va., 258*, the trustee recovered for the whole amount of the policy.

Nor does *Hough v. People's Ins. Co., 36 Md., 398*, favor the contention of the plaintiff in error. In that case the policy covered the merchandise of the insured "their own, or held by "them in trust, or in which they had an interest or liability." Parol evidence was offered to show that it did not cover merchandise which was their own; but this evidence was held to be incompetent. Surely; for that would not be to read the contract by the light of surrounding circumstances; but would be to contradict the plain terms of the written instrument.

The exact point was involved in *Home Ins. Co. v. Balt. Warehouse Co., 95 U. S., 543.*

If the law were otherwise, how could the nature and extent of the loss ever be shown?

The receipts given by the Compress Company and the bills of lading executed by the two railroad companies excepted losses by fire; but these exceptions, of course, did not free them from responsibility for damages occasioned by their own negligence, or that of their employes.

The principle of public policy that would prevent carriers from insuring against loss proceeding from negligence of their servants, has not heretofore been heard of, notwithstanding the immense number of policies of that kind always in force; and the novelty of the proposition to have the court overrule *Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S., 324*, on that point seems to preclude debate.

See also:

Patapsco Ins. Co., v. Coulter, 3 Pet., 237

Columbia Ins. Co. v. Lawrence, 10 id., 507.

Waters v. Merchants Ins. Co., 11 id., 220.

Orient Ins. Co. v. Adams, 123 U. S., 72.

The demurrer was properly sustained to the seventh paragraph of the answer of the defendant; for it did not show that the marine policies were on the same interest as that covered by the fire policy. The cases cited have no application. In *Kelly v. Worcester M. & F. Ins. Co., 97 Mass., 286*, the insurance was not to attach if the building insured should be occupied for any unlawful purpose. So in *Fire Assn v. Williamson, 26 Pa. St., 198*, the keeping of gunpowder avoided the policy. In the one case the illegal occupancy and in the other the keeping of gunpowder might easily have been discovered by the insured; but it was not possible for the Union Compress Company in Little Rock to know when, if at all, a marine policy might be issued in favor of some stranger in New York, London, Liverpool, Paris, or any where else on the habitable globe. The cases are plainly and essentially different. They are so diverse that different rules of interpretation must necessariiy be applied.

Insurance policies are to be construed most strongly against the underwriters.

Insurance Companies v. Wright, 1 Wall., 468.

National Bank v. Ins. Co., 95 U. S., 673.

Noonan v. Bradley, 9 Wall., 407.

Such a construction should be given to every contract as will make it effective. If the contention of the plaintiff in

error is correct, the policy sued on was of no practical utility; for as soon as the consignees were advised by telegraph of the shipment of the cotton, they took out marine policies in order to cover their own risk. At such time the ink was hardly dry on the policies taken out by the railway companies. According to that theory the fire companies got the premiums from the railway companies, and practically avoided all risk. This could not have been the intention of the parties. The contract must be construed *ut res magis valeat.* This question has been so fully and ably considered in the case of the *North British Ins. Co. v. London Ins. Co., 5 Chy. Div., 569 (22 Eng. Rep., Moak's Notes, 323)*, that an argument on it at present would be inappropriate; particularly as the decision made in that case has been twice cited by this court with approval.

Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S., 323-5.

The case thus approved was a very strong one for the underwriters; for in that case the condition was against any other subsisting insurance, "*whether effected by the insured or by any "other person.*" It would be indeed difficult to conclude that the parties intended to grant or receive an insurance that might be at any time annulled without the knowledge, connivance or consent of either party; and if such a construction was admissible the door for fraud and collusion would be thrown wide open. But the question is not otherwise new. "In or- "der to invalidate a policy upon the ground of a breach of "the condition against other insurance, it must be shown that "such other insurance was obtained by the insured, or some "one authorized by him to obtain it, or that he subsequently "assented thereto."

Wood Ins. (1st Ed.), sec. 352.

It was contended in the court below that the case of the *North British Ins. Co. v. London Ins. Co.* has been overruled by the decision in *Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S., 542.* But that is not true; for in that case the warehouse company insured for the benefit of the owners, and the owners themselves took out policies in their own names; so that there was a perfect identity of property and of interest. But in this case the fire policies were taken out for the benefit of the railway companies, and the marine policies were taken out for the benefit of the consignees; and these several interests were as distinct as those of a mortgagor and mortgagee, or of a tenant for life and remainderman.

In no event could the marine policies enure to the benefit of the railway companies; for if the marine companies should pay the loss, they would be subrogated to the rights of the owners as against the railway companies. In a suit of that kind the latter could not defend on the ground that they were not guilty of any negligence; for in any event the Compress Company was the agent and servant of the railway companies, and for its acts they would be liable. *Qui facit per alium facit per se.*

Railroad Co. v. Hanning, 15 Wall., 649.

It is wholly unnecessary to discuss the legal effect of the contribution clause of the policy referred to in the tenth assignment, as the question is not presented on the record.

Relating to this matter, the transcript is as follows:

"It appeared from bills of lading offered in evidence by "plaintiff, that the Little Rock and Memphis Railroad Com- "pany issued five bills of lading on cotton consigned to Ralli

"Bros, Liverpool, one of which is set forth above, and the "other four were precisely similar. Under these five bills of "lading it appears that a loss of 158 bales of cotton, valued "at $7488.36, was claimed to be burned at said fire. * * * "Defendant, to sustain the issue on its part, offered compe- "tent evidence tending to prove that at the time of said fire "2172 bales of cotton, covered by the bills of lading aforesaid, "and alleged to have been burned at the fire in question, and "of the value of $101,473.73, were at the time of said fire "covered by marine policies of insurance, theretofore issued "to the respective owners of said cotton, residing in various "portions of the United States and in England." (Tr. 34, 35).

The cotton thus referred to might well have been included in the bills of lading mentioned, and not have been the same that was insured in the policy sued on. On the proposition as made the court could not but reject it.

As to the eleventh assignment, there was no error. There was no proof that the policies referred to were in Liverpool. The witness had only been "informed" that they were there. As to the supposed copy, the witness only swore that Phillips "said it was a copy." This was all hearsay. (Tr. 37).

There are many other assignments of error; but none that we deem worthy of further notice.

Respectfully,

U. M. ROSE,
G. B. ROSE.